412 644-5754

DATE ISSUED: July 30, 1998

CASE NO.: 96-DBA-33

In the Matter of

Disputes concerning the payment of prevailing wage rates and proposed debarment for labor standards violations by:

**THOMAS AND SONS BUILDING CONTRACTORS,** a corporation, and **JAMES H. THOMAS,** Individually and as a corporate officer

With respect to laborers and mechanics employed on Contracts No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center and Contract No. F36629-93-C-0007 for the Pittsburgh Air National Guard

Appearances:

Linda M. Henry, Esquire and
Allison Anderson Acevedo, Esquire,
For the Petitioner

J. Robert Steelman, Esquire
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

**DECISION AND ORDER**
**FINDING VIOLATION OF PREVAILING WAGE DETERMINATIONS**
**AND**
**RECOMMENDING DEBARMENT**
**BACKGROUND**

This matter involves a dispute concerning the payment of wages and proposed debarment

of the Respondents, under the Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.*, as amended, (the "Act"), and its implementing regulations, found in Title 29, Code of Federal Regulations (C.F.R.), specifically 29 C.F.R. §§ 5.11 and 5.12.[1]

The Petitioner is the U.S. Department of Labor (DOL), represented by the Office of the Solicitor, U.S. Department of Labor, and the Respondent is Thomas & Sons Building Contractors, Inc., and James A. Thomas, individually and as a corporate officer.

Two formal hearings were conducted in the matter, in Philadelphia, Pennsylvania, February 3-4, 1998, and in Pittsburgh, Pennsylvania, on April 28-29, 1998. The United States Department of Labor, the respondent corporation and Mr. Thomas were all represented by counsel. The parties were given the full opportunity to present evidence and to examine and cross-examine witnesses. Government exhibits 1-19, Respondent exhibits 1-2, and, Joint exhibits 1-2 were admitted without objection at the first hearing. Government exhibits 20-32 and 34-37, and Respondent exhibits 3-5, were admitted at the second hearing. Post-hearing briefs were submitted by the Petitioner and by the Respondents on July 10, 1998.

The Administrator's Order of Reference states this is a dispute concerning the payment of prevailing wage rates, applicable overtime and the proposed debarment of the contractor and James H. Thomas.[2] The Administrator states he has reasonable cause to believe the Respondents have disregarded their obligations to employees, under the Davis-Bacon Act, and have committed aggravated or willful violations of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327 *et seq.*, within the meaning of 29 C.F.R. § 5.12(b)(1).[3] It is alleged, under both contracts listed in the case heading, the Respondents misclassified and paid employees performing "roofers" work as "laborers" and, with respect to the Navy contract, workers classified as "Kettlemen" were paid less than the required rate for "roofers."[4]

In its Reply to The Secretary's Response to the Order of Reference, the Respondents admit certain of its employees worked on the contracts performing "clean-up," "maintenance," and "non-roofing laborer's" work on roofs and were paid "laborers" rates, in accordance with the applicable wage determinations.[5] The Respondents denied misclassifying "roofers" as "laborers" and denied paying workers performing roofers' work at laborers' rates. The Respondents further

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[1] "Wages" means the basic hourly rate of pay. 29 C.F.R. § 5.2(p).

[2] The "Administrator" is the Administrator of the Wage & Hour Division, Employment Standards Administration, U.S. Department of Labor. 29 C.F.R. § 1.2(d). The "Order of Reference" serves as a "complaint." 29 C.F.R. § 6.30(B).

[3] The Petitioner states it does not contest overtime compensation. Thus, the Contract Work Hours & Safety Standards Act, does not apply.

[4] One is "employed" if one performs the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work . . . regardless of any contractual relationship alleged to exist between the contractor and such person. 29 C.F.R. § 5.2(o).

[5] The term "laborer or mechanic" includes "at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. . . . The term does not apply to workers whose duties are primarily administrative, executive or clerical, rather than manual. . . Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent." 29 C.F.R. § 5.2(m).

contest the criteria used by the Administrator in making his wage determinations.

The DOL amended its Order of Reference through its pre-hearing submission. (TR 345).

The issues to be determined in this case are centered about two contracts between the respondents and two U.S. government agencies:[6]

1. Contract No. N62472-90-C-0410**,** for the Wilmington, Delaware, Naval Reserve Center, allegedly covering the period of July 30, 1991-August 10, 1992 (hereinafter the "Naval Reserve" contract); and,

2. Contract No. F36629-93-C-007 for the Pittsburgh Air National Guard allegedly covering the period of July 12, 1993-July 14, 1994 (hereinafter the "Air Guard" contract).

## ISSUES[7]

I. Whether this forum has jurisdiction over the parties and subject matter of this dispute?

II. Whether the Respondents, in fact, had the two contracts with agencies of the U.S. government?

III. Whether employees of the Respondents or laborers working at the site of the contracts were paid rates for the classification of work actually performed, without regard to skill (except as provided for apprentices & trainees, under 5 C.F.R. § 5.5a(4)), not less than those contained in the wage determination of the Secretary of Labor?

A. Whether enumerated employees under the Naval Reserve contract were performing work properly classified as "roofer" and being paid at "kettleman" and "laborer" rates? and,

B. Whether enumerated employees, under the Pittsburgh Air National Guard contract were performing work properly classified as "roofer" and being paid at "laborers" rates?

1. Whether Respondents' employees who performed work, under the referenced contracts, performed "clean-up" and other "maintenance" work on roofs?

2. Whether the referenced workers, who performed "clean-up and maintenance" work on roofs, were paid according to the "laborers"

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[6] "Contract" means "any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 (i.e., the Davis-Bacon Act) and any subcontract of any tier thereunder, let under the prime contract. 29 C.F.R. § 5.2(h).

[7] The matter of whether the respondents committed aggravated or willful violations of the Contract Work Hours and Safety Standards Act , 40 U.S.C..§ 327, *et seq*, set forth in the Order of Reference, is no longer in issue. (TR 11).

rate in the prevailing wage determinations attached to the referenced contracts?

3. Whether the prevailing union practice in the areas where the contracts were awarded was to pay workers who performed "clean-up and maintenance" work on roofs, according to the "roofers" rate?

IV. If the above-referenced employees were so underpaid, what is the amount each such employee was underpaid?

A. Were the employees, under Contract No. N62472-90-C-0410 ("Naval Reserve" contract) paid $19.00 and $24.50 per hour when the Wage Determination required payment of $28.50 per hour and was the total underpayment for seven (7) employees $5650.00?

B. Were the employees, under Contract No. F36629-93-C-007 (Air Guard" contract) paid $18.11 per hour when the Wage Determination required payment of $23.44 per hour and was the total underpayment for 28 employees $20,239.41?[8]

V. Whether the Respondents disregarded their obligations to employees, under the Davis-Bacon Act, within the meaning of 29 C.F.R. § 5.12(b)(1), and should be subject to debarment, under the section 3(a), Davis-Bacon Act?

Whether the Respondents repeatedly and willfully disregarded their obligations under the Davis-Bacon Act by misclassifying workers performing "roofers" work as "laborers" and by paying workers performing "roofers" work at "laborers" rates?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW[9]

[8] The term "wage determination" includes "the original decision and any subsequent decisions modifying, superceding, correcting, or otherwise changing the provisions of the original decision." 29 C.F.R. § 5.2(q). The Petitioner represented at the hearing, in Pittsburgh, that the Order of Reference had been amended increasing the amount of back wages allegedly owed by the Respondents on the Air Guard contract to $24,674.36. (TR 345, 761-3). The Petitioner did not adhere to the specific procedures of 29 C.F.R. § 6.31 for amending complaints. Despite this dereliction, I permit the amendment considering the absence of any objection by the Respondents at the hearing when the matter was raised and the general purposes of the Act to protect underpaid employees.

[9] Petitioner's exhibits are marked "GX," Respondent exhibits "RX," Joint exhibits "JX" and the transcript testimony "TR." Each reference to a TR page number will refer to the witness whose testimony is being discussed, unless otherwise indicated.

## Purpose of the Act[10]

The Davis-Bacon Act was created for the protection of employees, not employers. *Unity Bank & Trust Co. v. U.S.*, 756 F.2d 870, 873 (D.C. Cir. 1983). The Davis-Bacon Act was enacted during the Great Depression to ensure workers on federal construction contracts would be paid prevailing wages in the area of construction. Since the low-bidder on such jobs was generally the one who paid the lowest wages, it was feared contractors would take advantage of then widespread unemployment in the industry by hiring workers at substandard wages, often bringing in crews from distant areas. This practice was unacceptable because it undermined a purpose of the massive federal construction programs of the era to distribute employment and federal funds country-wide. Secondly, such lower wages led to labor strife and broken contracts by bidders who unwisely speculated on the labor market, thus preventing the most economical and orderly granting of Government contracts. *Building & Construction Trades' Dept., AFL-CIO v. Donovan*, 712 F.2d 611 (Fed. Cir. 1983) *citing* S. Report No. 332, 74th Congress, 1st Session pt 2, at 4 (1935), S. Rep. No. 1445, 71st Congress, 3d Session 1-2 (1931), S. Report No. 332, supra at 613, pt. 2, at 8.

The original Act was enacted in 1931. In 1935 Congress passed wage predetermination and enforcement provisions which have remained essentially unchanged. In every federal construction project, in excess of $2,000.00, requiring the employment of mechanics and/or laborers, the advertised specifications shall:

> contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed.

40 U.S.C. § 276a(a). Construction contracts must contain a stipulation requiring the advertised wages be paid and the applicable wages must be posted at the site.

## Jurisdiction

The parties stipulated and I find that this forum has jurisdiction over the parties and subject matter of this dispute. (TR 13-14).

## The Contracts

Two contracts between the respondents and two U.S. government agencies are involved:

1. Contract No. N62472-90-C-0410**,** "Roof Repair, Naval Marine Corps Reserve Center (NMCRC), Wilmington, DE" for the Wilmington, Delaware, Naval Reserve Center, allegedly

[10] This history is taken from the decision in *Building & Construction Trades' Dept., AFL-CIO v. Donovan,* 712 F.2d 611 (Fed. Cir. 1983).

covering the period of July 30, 1991-August 10, 1992 (hereinafter the "Naval Reserve" contract)(GX 1); and,

2. Contract No. F36629-93-C-007 (Roof Repair) for the Pittsburgh Air National Guard allegedly covering the period of July 12, 1993-July 14, 1994 (hereinafter the "Air Guard" contract).

*Naval Reserve Contract*

The Naval Reserve contract project description was:

> The work includes the complete removal of the existing slag surfaced, built-up roof membranes, membrane flashings, metal flashings and insulation down to the structural concrete and steel substrates. The provision of new gravel surfaced, 4-ply glass built-up roof membranes, insulation and bituminous and sheet metal flashings and incidental related work.

The Naval Reserve Contract Solicitation included and provided that the following documents, among others, would form the contract:

1. Labor Standard Provisions (Feb 1990);
2. Contract Clauses - Construction Contracts (Oct 1990);
3. Wage Determination, Secretary of Labor Decision No. DE91-2 (April 12, 1991) including Modification No. 1 (March 8, 1991) and No. 2 (April 12, 1991); and,
4. The Solicitation, Offer and Award (Standard Form 1442).

The "General Wage Determination" for the Naval Reserve Contract (DE91-2) applied to "building and heavy" statewide, in Delaware, and included basic hourly rates for laborers ($14.02 to $17.27) plus fringe benefits and roofers ($21.97) plus fringe benefits for roofers of $6.53 for a total of $28.50. (GX 1). The wage determination itself does not explicitly state any given prevailing area practice. Section 02050, Part 3, of the contract specifically describes the nature of the removal work, Section 04200, Part 3, the masonry work, Section 06100, Part 3, the carpentry work, Section 07222, Part 3, the roof insulation work, Section 07511, Part 3, the aggregate surfaced bituminous built-up roofing work,[11] Section 07600, Part 3, the flashing and sheet metal work, Section 07920, Part 3, sealants work, and, Section 09900, Part 3, painting. (GX 1).

Paragraph 16a of a "Preconstruction Conference Guide," (Naval Reserve Contract) establishing the administrative procedures to be followed in the execution of the contract, set forth the responsibility of the contractor, under the Davis-Bacon Act, to: "(1) pay minimum wages; (2) Post contracting wage determination"; and, (3) under "Payrolls," to "classify all workers in accordance with wage decisions included in contract document . . . " (GX 3, page 7-8). It also listed the contract award price of $118,569.00. Government exhibit 4 reflects the labor cost of removing and installing the roof as $45,066.

*Air Guard Contract*

[11] Paragraph 1.3.3 "Preroofing Conference" provides for a conference to review the "[C]ontractor's plan for coordination of the work of the various trades involved in providing the roofing system and other components secured to the roofing."

The Air National Guard Contract called for the "repair" of the Gymnasium Roof, Building 120, and "repair" of the roof, Building 419 (Operations Building). (GX 21). The work was described as:

> Gymnasium
>
> Perform all operations necessary to remove and dispose of the existing membrane, aggregate, insulation, gravel-stop and flashings, vents, roof drains and down spouts. Remove and dispose of asbestos containing roof material. Install an aggregate coated BUR system with four plies of asphalt coated fibrous glass felt. Provide rosin paper and base sheets nailed to the wood deck. Provide two layers of insulation, roof access hatch, power roof exhausters, protective pads, crickets, down spouts, all as indicated on the contract documents.
>
> Removal, disposal and replacement of damaged or rotted 1" thick roof sheathing with 1" thick plywood . . .
>
> Operations Building
>
> Perform all operations necessary to remove and dispose of the existing membrane, aggregate, insulation, gravel-stop and flashings, and roof drains. Remove and dispose of asbestos containing roofing material. Install an aggregate coated BUR system with four plies of asphalt coated fibrous glass felts. Install new insulation, protective pads, crickets, roof drains, metal flashing, reglets, counter flashing and aluminum coping, all as indicated on the contract documents.

The $186,127, Air National Guard Contract included the following clauses and or documents, among others:[12]

1. FAR 52.222-1 (Apr 1984) Notice to the Government of Labor Disputes;
2. FAR 52.222-6 (Nov 1992) Davis-Bacon Act;
3. FAR 52.222-7 (Feb 1988) Withholding of Funds;
4. FAR 52.222-8 (Feb 1988) Payrolls and Basic Records;
5. FAR 52.222-11 (Feb 1988) Subcontracts (Labor Standards);
6. FAR 52.222-13 (Feb 1988) Compliance with Davis-Bacon and Related Act Regulations;[13]
7. FAR 52.222-14 (Feb 1988) Disputes Concerning Labor Standards;
8. FAR 52.236-3 (Apr 1984) Site Investigation & Conditions Affecting the Work;
9. Paragraph 14, Preconstruction Conference; and,
10. General Decision No. PA930001 (15 pages).

The "General Wage Determination" for the Air National Guard Contract applied to "Building Erection and Foundation Excavation Projects," in Allegheny County, among other western Pennsylvania counties, and included basic hourly rates for both common and skilled "laborers" ($13.75 plus fringes and $13.90 plus fringes) and "roofers" $18.39 plus fringe benefits

[12] Federal Acquisition Regulations (FAR), 48 C.F.R., Chapter 1. The full text of the Labor-related FAR provisions were provided to the Respondents at a pre-Construction Conference. (GX 22 & 24; Testimony of Mr. Shamonsky).

[13] FAR 52.222-13 states: "All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5 are hereby incorporated by reference in this contract."

for roofers of $5.05 for a total of $23.44. (GX 21).

Stipulated Facts[14]

*Naval Reserve Contract*

The parties agreed that the following seven individuals were Respondents' employees, during the time period of May 16, 1992 to August 8, 1992, who performed worked under Contract No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center:

| | | |
|---|---|---|
| Richard Chandler | William Porvasnik | Victor Siemanawicz |
| Christopher Labouseur | Tracy Scarpulla | |
| James Lobue | Michael Sinkiewicz | |

The parties further agreed that Contract No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center, was held by the Respondents for the time period of July 30, 1991 to August 10, 1992 and the dollar amount of said contract was in excess of $50,000. Wage Determination DE91-02 was attached to Solicitations for Contract No. N62472-90-C-0410. The Respondents filed no challenge to said Wage Determination prior to bidding on the contract, however, they have objected to the "wholesale and unnoticed inclusion by DOL of multiple tasks within a single wage rate." The Respondents paid all the above individuals at the hourly rate listed on the Form WH-55 prepared for that individual for the period listed under the column labeled "Year and Workweek Ending" and each individual, except as otherwise noted, worked for the number of hours listed under the column labeled "total" for each workweek listed under the column "Year and Workweek Ending."

Comparison of the certified payroll records revealed the following inconsistencies between the Respondent's payroll records and the DOL WH-55s, on the Wilmington project:[15]

| Employee | Week | Respondents' Payroll | DOL WH-55 |
|---|---|---|---|
| Michael Sinkiewicz | 5/23 | 40 @ $19.00 | 29 hours |
| | 6/20 | 15.5@ $24.50 | 15.5 @ $19.00 |
| William Porvasnik | 5/23[16] | 40 @ $19.00 | 29 @ $19.00 |
| | 6/6 | 40 @ $19.00 | 43 @ $19.00 |
| | | 3 @ $28.50 | |
| Tracy Scarpulla | 6/20 | No record of work this week | 7.5 @ $19.00 |

[14] JX 1 and 2.

[15] Under 29 C.F.R. § 5.5(a)(3)(i), firms are required to maintain and preserve payroll and basic records for all laborers and mechanics working at a project site for a period of three years. Section 5.5(a)(3)(ii) requires contractors to submit weekly certified payrolls to the contracting officer certifying that the payrolls were correct and complete, the wage rates paid were not less than those determined by the Secretary of Labor, and that the classification set forth for each laborer and mechanic conformed to the work performed. These requirements were included in the contract specifications.

[16] GX 5, page 4, shows he worked 5/17-5-23/92 for 29 hours @ $19.00/hour. However, the hours worked each day add up to 39 hours.

| | | | |
|---|---|---|---|
| William Porvasnik | 6/20 | No record of work this week | 15.5 @ $19.00 |
| James Lobue | 6/20 | No record of work this week | 7.5 @ $19.00 |

Based on the testimony of Mr. Durbin, the Department of Labor Regional Wage Specialist, and Government Exhibits 5, 36, and 37, I find Mr. Sinkiewicz worked 39 hours the week ending 5/23 and was paid $551.00 for an hourly rate of $14.13. I find he worked 15.5 hours the week of 6/20 as proven by the DOL. The DOL established Mrs. Scarpulla, Porvasnik and Lobue worked as the DOL claimed the week of 6/20. I find Mr. Porvasnik worked as the DOL claimed the week of 6/6. (GX 5, 36, 37).

*Air Guard Contract*

The parties agreed that the following individuals were Respondents' employees, during the time period of October 1, 1993 to July 14, 1994, who performed worked under Contract No. F36629-93-C-0007 for the Pittsburgh Air National Guard:

| | | |
|---|---|---|
| Russell E. Beck | Robert Hutton | Kevin McCreight |
| David J. Black | Michael Jones | John T, McMorris |
| Marvin Brown | Irvin Kelley | Michael Messner |
| George Delp, Jr. | Bernard Kirley | Stanley Peterson |
| Richard Donophan | Joseph Kletzli | Frank Robson |
| Roger W. Faith | Stephen Kurtz | Frank Scapes |
| Eric J. Gritter | Robert L. Lagerski | Vincent R. Shaw |
| Joseph Harris | Robert J. Leach | Glenn Szclulski |
| Hugh P. Hootman, Jr. | James Lowery | |
| Earl D. Hoy | Ronald Lowery | |

The parties further agreed that Contract No. F36629-93-C-0007 for the Pittsburgh Air National Guard was held by the Respondents for the time period of July 12, 1993 to July 14, 1994 and the dollar amount of said contract was in excess of $50,000. Wage Determination PA93-001 (Mod 0, 2/19/93) was attached to Solicitations for Contract No. F36629-93-C-0007.[17] The wage determination itself does not explicitly state any given prevailing area practice. The Respondents filed no challenge to said Wage Determination prior to bidding on the contract, however, they have objected to the "wholesale and unnoticed inclusion by DOL of multiple tasks within a single wage rate." The Respondents paid all the above individuals at the hourly rate listed on the Form WH-55 prepared for that individual for the period listed under the column labeled "Year and Workweek Ending" and each individual worked for the number of hours listed under the column labeled "total" for each workweek listed under the column "Year and Workweek Ending."

*Both Contracts*

The Respondents admitted that certain of the above-named employees who worked on the referenced contracts performed cleanup work and other maintenance work and non-roofing

[17] The Administrator explained, in the Charging Letter attached to the Order of Reference, that this wage determination reflects the local collectively bargained rates for the classifications of Roofers and Laborers. Apparently, Assistant District Director, Mr. Richard J. Clougherty's letter of March 6, 1995 to Ms. Gannister (Respondent's former counsel) made an allowance of 25% of the hours paid as laborers on the certified payrolls to cover "clean-up" work and the remaining 75% of the hours paid as laborers was multiplied by the difference between the required rate for roofers and the rate actually paid. This resulted in a computation of $20,239.41 in back wages for 28 workers.

laborers' work on roofs and were paid according to the "Laborers" rate in the Wage Determinations attached to the referenced contracts.[18] However, the parties did not agree that the Respondents misclassified workers performing "Roofers" work as "Laborers" or that they paid workers performing "Roofers" work at "Laborers" rates. The Respondents specifically denied that any back wages are owed.

The parties agreed that $20,239.00 has been withheld from Contract No. F36629-93-C-0007 and $6,500.00 from Contract No. N62472-90-C-0410.[19]

## Naval Contract Documentary Evidence

### *Payroll Records*

The Respondents' certified payroll records, for Contract No. N62472-90-C-0410 for the Wilmington, Delaware Naval Reserve Center, show that the following employees held the positions indicated as well as reflecting their weekly hours worked and pay:[20]

James H. Thomas-owner
C.M. Brown-supervisor
Richard Bednarz-project manager
Rubin Donaldson-laborer
Jeffery Donaldson-laborer
Robert Vannote-owner Vannote Roofing/roof tech
Jason Thomas-superintendent
Charles Mack-brick mason
James Waters-brick mason
Joseph Gulotta?-laborer/painting sheet-metal/carpenter
Joseph Cannella-remove gravel
Lane Morella-student/part time
Michael Sinhaving?-roofer
*Richard Chandler-labor/kettleman*[21]
*Christopher Labouseur-laborer/kettleman*[22]
*Victor Siemanawicz-laborer/kettleman*[23]
*Michael Sinkiewicz-laborer/kettleman*[24]
*William Porvasnick-laborer/roofer*[25]
Edward Vollrath-applied roof/roofer
George DeDeux-roofer
Pat Piaggio-supervisor
*Tracy Scarpulla-laborer*
*James Lobue?-laborer*
Jeffrey Pierce-sheet-metal/laborer
Frank Cannella-owner
Ed Goodwin-remove gravel
Gary DeDeux-roofer
Jodie Wood-roofer

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[18] Reply of Thomas & Sons Building Contractors, Inc., and James H. Thomas to Secretary's Response to Order of Reference.

[19] Id.

[20] Italicized employee names reflect those whom the DOL alleges were underpaid. Question marks denote concerns over the proper spelling of the employee's names.

[21] Paid as a kettleman 5/24/92-5/30/92. (GX 5).

[22] Worked as a kettleman: 8/2-8/8/92. (GX 5, #16). He is misidentified as Lobousnich on the employer's payroll certifications and in GX 36 & 37.

[23] Worked as a kettleman 6/14-6/20/92; 6/21-6/27/92; 6/28-7/4/92; 7/5-7/11/92. (GX 5, p. 9).

[24] Paid as a kettleman 5/24/92-5/30/92; 6/1-6/6/92; 6/7-6/13/92; 6/7-6/13/92 paid $28.50 for 3 hours; 8/14-8/20/92. (GX 5).

[25] Worked as a roofer 8/2-8/8/92. (GX 5 # 16).

Rodney Bohler?-laborer

Those certified payroll records further showed, as early as 5/16/92, that named employees who hauled debris off the roof were classified as "laborers" and paid a wage of $19.00 per hour, those who applied roofing were classified as "roofers" and/or "mechanics" and paid a wage of $28.50 per hour and "kettlemen" were paid a wage of $24.50 per hour. (GX 5, #4).

On May 17, 1992, Jeffrey Cantwell, President, Falcon Associates, Inc., a subcontractor, certified the proper classification and payment of his employees: Burns, Pederson, Drumwright, Hurst, and, Moore. (GX 5). Likewise, Frank Cannella, a subcontractor who removed gravel, certified the same on May 5, 1992. (GX 5).

*Naval Contract Correspondence*

On June 3, 1992, Carl Hutchinson, a Department of the Navy Supervisory Construction Representative, wrote to the Respondents informing them "[A]ll employees connected with the removal of old and the application of new roofing systems shall be classified as roofers." (GX 6).

Mr. Hutchinson wrote to the Respondents, on June 16, 1992, concerning the latter's reply to the "OIC Letter to Thomas & Sons dated 3 June 1992." (GX 7). He pointed out that the Wage Determination (DE91-2) does not include in its laborer definition a work procedure involving roofs and that the DOL defined "area practice" governs the classification of employees. He also said employees must be reimbursed for erroneous payments listed on the payrolls. (GX 7).

The Respondents replied to Mr. Hutchinson's June 16, 1992 letter, on June 22, 1992, informing the latter the "problem" regarding Mr. Vannote was resolved and questioning the DOL classification situation. (GX 8). Mr. Thomas admitted having no government documents stating that only roofers may be used on the project or any other project. He had learned the Navy learned of the "roofers only" position through Roofer's Union, Local 30, and asked why bidders had not been so informed prior to bidding. He accused the Navy of having foreknowledge of the DOL requirement at least two years in advance. He ended by informing the Navy he was awaiting written DOL confirmation of the "roofers only" classification. (GX 8).

The Respondents introduced a letter by Carl Hutchinson, the Navy's Supervisory Construction Representative for the Naval contract, dated June 29, 1992, to the DOL, informing the latter it was withholding $10,000 from the Respondents' contract for possible wage violations, i.e., the classification of employees involved with removal and reinstallation of a roofing system as "laborers". (RX 2). Mr. Hutchinson asked for written documentation concerning the area precedent (practice) of classifying all workers engaged in removal of roofing debris, tearing and/or scraping off of old roofing systems or installation of new roofing systems as "roofers," in order for him to enforce the wage action. (RX 2).

The Respondents introduced a letter by George C. Durbin, Regional Wage Specialist, DOL, dated July 9, 1992, to Carl Hutchinson, the Navy's Supervisory Construction Representative for the Naval contract, which responded to the latter's June 29, 1992 letter. (RX 1). He pointed out that wage determination DE91-2 reflected the collectively bargained rates in the area and that consequently, classification determinations must be made by determining the

area practices followed by firms subject to the collective bargaining agreements. According to the local Roofing Contractors' Association, and Laborers' and Roofers' Unions, the "area practice" for the removal of roofing debris, tearing and/or scraping off old roofing systems or the installation of a new roofing system is performed by roofers or registered roofer apprentices, and "laborers are used only for the total demolition of a roof or for tending and clean-up duties performed on the ground."[26] (RX 1).

On July 12, 1990, Kinsey M. Robinson, International Secretary-Treasurer, United Union of Roofers, Waterproofers and Allied Workers, wrote to Ms. Patricia Moran, Prevailing Wage Monitor, The Roofing and Sheet Metal Contractors Association of Philadelphia and Vicinity, concerning Roofers' Union jurisdiction over roof removals and/or tear-offs. He referred to the "Constitution & By-Laws United Union of Roofers, Waterproofers & Allied Workers" Article II, Section 5, quoted in full below. He wrote: "This language unequivocally places the jurisdiction of roof removal and/or tear-off, as well as attendant cleanup of those areas, where a re-application of a roof membrane will be performed, squarely in our work scope for members of The United Union of Roofers . . . and no other."

On July 13, 1992, LTJG P. R. McNiece, the Assistant Resident Officer in Charge of Construction, forwarded to the Respondents a copy of the DOL letter he had received concerning the use of workers classified as "laborers" on the subject roofing project and informing him if he disagreed he could file a protest with the DOL. (GX 9).

LTJG P. R. McNiece informed the Respondents, on July 13, 1992, that he had received DOL confirmation that "workers involved in the removal of roofing debris, tearing and/or scraping off of old roofing systems or in the re-installation of a new roofing system should be classified and paid as 'roofers' vice 'laborers'." (GX 10). He informed Respondents that $10,000 would be withheld in payments as a result of the misclassification. (GX 10).

On July 27, 1992, LTJG P. R. McNiece wrote to the Respondents concerning interviews the Navy had conducted of the latter's employees, withholding of payments, a query from a contractor employee concerning labor violations, liquidated damages, and, Mr. Thomas' request for a contract modification. (GX 11).

The contracting officer, LCDR Bernstein, sent a "performance evaluation" to the Respondents, on September 25, 1992, which addressed compliance with labor standards.[27] He pointed out the DOL had determined the Respondents had incorrectly classified workers as "laborers" vice "roofers" and underpaid them. LCDR Bernstein wrote this was unsatisfactory and $12,000 would be withheld until the matter was resolved. He noted the Respondents had appealed the classification to DOL. (GX 12).[28]

The Petitioner introduced a letter from Mr. James E. Sykes, Deputy Regional Administrator, DOL, Employment Standards Administration, Wage and Hour Division, Philadelphia, dated October 23, 1992, responding to Ms. Ruth Gannister's, the Respondents' former legal counsel, letter of August 31, 1992, regarding Davis-Bacon labor standards

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[26] Based on information from both the Roofers' and Laborers' Unions, i.e., Mr. Robinson's July 12, 1990 letter, Mr. Durbin was wrong, in that laborers are not used for "tending and clean-up duties performed on the ground."

[27] I only consider section "D" of the document.

[28] The only portion of this exhibit considered pertains to compliance with labor standards. (TR 241-243).

investigations of the Respondents.[29] (GX 34). The letter explained general principles of the administration of the Act, including the manner of challenging wage determinations. It specifically provided that if a wage determination reflects union or collective bargaining rates DOL looks to the local union practice, prior to the beginning of construction, to determine the proper classification of employees. The letter reviewed the findings and status of each of seven investigations, including the Naval Reserve contract at issue herein, and discussed what needed to be done to resolve open issues.

*Construction Representative's Reports*

Construction Representative's Reports were prepared by Michael Mack, a contract representative, during the course of the contract performance, April 22, 1992 through November 12, 1992. (GX 13; TR 81). The handwritten reports record Mr. Mack's job site surveillance and/or inspections. They reflect a "preroofing conference" was held on April 27, 1992. Among other matters, these notes record Mr. Mack's regular observations of the contract work, including "roofing" work, clean-up, temporary repairs, attendance of supervisors/employees, and quality of performance. During this period, Mr. Mack counted the number of roofers ranging from none to seven. On May 12, 1992, he wrote Mr. Vannote, the owner of Vannote Roofing Co., had informed him he was a subcontractor on the contract. On June 2, 1992, he conducted labor standards interviews. On June 5, 1992, he identified Jeff Donaldson as a roofer and P. Piaggio as a superintendent.[30]

*Daily Report to Inspector*

The Petitioner submitted the Respondents' "Daily Reports to Inspector" from April 23, 1992 through September 18, 1992. (GX 14). These reports appear to have been handwritten, on Thomas & Sons Contractor's Daily Logs, by the Respondents' superintendents then summarized, typed and signed by Mr. Thomas or Pat Piaggio prior to submission on "Daily Reports to Inspector". They described the number and trades of the employees, the total hours worked and identified their employers. The reports also described the location and type of work performed. The following employees, trades and employers are identified:[31]

Cager M. Brown-superintendent
Frank Cannella-Garden State (gravel)
Joseph Cannella-Garden State (gravel)
Ed Goodwin-Garden State (gravel)
Lane Morella-(gravel)
Rubin Donaldson-laborer
Jeff Donaldson-laborer
Bob Vannote-roofer/laborer/Vannote
Edward Vollrath-roofer/mechanic
*Chris Labouseur-roofer/laborer*
Eric Pederson-superintendent
John Burns-laborer (asbestos)
Paul Moore-laborer (asbestos)
John S Hurst-laborer (asbestos)
Pat Piaggio-supervisor
E. Pederson-asbestos/Falcon
Robert Drumwright-asbestos/Falcon
Richard Bednarz-project manager
James Waters-brick mason
Charles Mack-brick mason

[29] The Respondents did not object to the admission of GX 34. Only two of the investigations, other than the Naval Reserve contract, concerned misclassification of "roofers" as "laborers." I do not consider any other investigation than those two, and then only for the limited purpose of evaluating the Respondents' claims of ignorance when considering the issue of "disregard of obligations" to employees under the Davis-Bacon Act.

[30] Payroll records show Jeff Donaldson was not paid as a "roofer."

[31] The Respondent is the employer unless otherwise noted. The italicized names represent underpaid workers.

*Rich Chandler-roofer/laborer*
*Victor Siemanawicz-roofer/laborer/kettleman*
Gary Dedeux-roofer
*Tracy Scarpulla-laborer*
*James (Jimmy) Lobue-laborer*
*Michael Sinkiewicz-roofer/laborer/Vannote*

These documents revealed that the Respondent's workforce included non-roofers when various roofing work was performed, such as, ripping off roof, removing roofing materials and filling dumpsters with it, rolling and mopping-in roof plies, and installing insulation and roofing. They also show that both Vannote and Respondent employees were utilized as laborers and roofers at various times. The reports do not generally illustrate the exact nature of the work performed by each trade.

"Gravel removers" working for Garden State were used to remove stones. Roofers, asbestos specialists and laborers were on site when asbestos was removed from the roof. On May 29, 1992, the reports show the work performed was "ripping off roof and reinsulating, reroofing and cleaning up work area," yet the workforce included only one roofer (Edward Vollrath) and one kettleman (Victor Siemanawicz) out of a group of eight employees. The reports reflect some work was done in the presence of Carl Hutchinson and Mike Mack. On June 2, 1992, the report shows the work included "ripping off and reinstalling roof" yet no roofers and one kettleman worked. It appears that generally when roofing was ripped-off and replaced or when the four-ply system was installed, both laborers and roofers were on the site. On June 10, 1992, the typed Daily Report shows one roofer worked while the handwritten Daily Report shows six did. On June 12, 1992, the handwritten report shows four roofers/kettleman for cleaning and preparing roof tops, yet the typed version shows only one roofer/kettleman. On June 15, 1992, five roofers/kettleman are reported on the handwritten report but only two roofers/kettleman on the typed.

It appears whenever "hot tar" was used on the roof, four-ply roof system was applied or stone was being "spotted", "roofers" and a "kettleman" were reportedly used on the site. The reports in late June-early July 1992 regarding "working on metal flashing on south wing" showed no roofers worked. No roofers were used on July 7, 1992, to "complete the lower north wing roof" which included extending the roof edges or on July 13-14, 1992 for "blocking out roof and framing." "Sheet metal" tradesmen were used to install metal flashings and fascia. "Metal-roofers" were used in late July-early August to install fascia, soffit, caulk, installing gravel stops, resecuring mechanical roof equipment, hot tarring edges and adding tapered board to roof edges. No "laborers" were used those days. Roofers were used August 6-7, 1992 to put hot tar on roof edges, install flashings, expansion joints, and roof rings for drains. No "laborers" were used those days. No roofers were used during the final clean-up August 10-14, 1992 and September 18, 1992.

*Roofers Local Union No. 30 "Working Agreement"*

The Petitioner submitted a "Working Agreement of the United Union of Roofers, Local 30, and the Roofing and Sheet Metal Contractors Association of Philadelphia and Vicinity" for the period of May 1, 1989-April 30, 1993. (GX 15). The collective bargaining agreement is applicable to all workmen performing the work of roofers in the Philadelphia-Wilmington area working for employers having signed contracts with the union. (Articles V, Sections 1, 2 and 4). Article V describes the nature of "roofer's" work encompassed by the agreement and Article XI the minimum hourly wage for doing such work within the jurisdiction of Local 30. Article XIII, Section 4, states, "Journeymen roofers shall handle all roofing material on the job . . . (and) to

move, load or unload on the job site all roofing materials and/or roofing equipment except for an occasional piece(s) of equipment delivered to, or received from, the job site before the job begins or after it ends . . ." Article XIV, Section 1, subparagraph (b) provides, "There shall be no less than two (2) roofers on any roofing work . . . except on repair work where only cold material used . . ." Article XIV, Section 1, subparagraph 3, states, "There will be a kettleman in attendance at all times . . . This provision shall not apply to re-roofing . . ."

Appendix A of the Working Agreement lists the following gross labor cost for journeymen roofers as: $26.18 (increased $1.50 each 5/1) for the period of 5/1/89-4/30/93.

Article V describes the nature of "roofer's" work provides that the agreement applies to any work upon delivery to the hoist or point of operation (if on ground) in unloading, handling, and applying the following materials:

> (a) All Spandrel and through-wall flashing;
> (b) All compressed or chemical prepared paper, glass, rubber, plastic, vapor barrier or other substitutions, including dry sheet, and all burlap, ducking, or other fabric, prepared or otherwise, when used for roofing or damp or waterproofing purposes together with all coating thereof;
> (c) All bituminous or other damp-resisting and waterproofing preparations when applied with a mop, sprayer, trowel, roller or brush and all primer in connection with roofing or damp or waterproofing work;
> (d) All gravel, slag, tile, brick, or wood blocks and all cork, fiberboard, flaxilinum, fibre-felt, fiberglass, or foam glass, any analogous material when nailed or embedded in pitch, tar asphalt, bituminous cement, or any analogous substance, when used as a roofing, damp or waterproofing base or vapor barrier and including insulation when used on inside or outside of walls;
> (e) All single-ply roofing, damp-proofing or waterproofing systems, either liquid or sheet applied;
> (f) All plastic, slate, and all tar-rock or any analogous type of damp-resisting floor fill or perimeter insulation;
> (g) All roofing, damp-proofing and/or waterproofing plastics whether sprayed on, brushed on or applied in any other fashion.
> (h) Any and all other materials whose general nature, purpose, and/or method of application are analogous to any of the foregoing.
> (i) All work in connection with the removal of roofing debris, tearing off and scraping off of old roofing as well as ripping off all tile work in conjunction with the application of a new roof at the same deck location.
> (j) All work in regard to the cutting of holes in a roof and the patching of the same except where done in connection with the installation of an occasional pipe of minimal size or the cutting of occasional holes.
> (k) It is specifically understood that the coverage of this agreement includes all work on tankers, kettles, vacuum machine, and other instrumentalities performing similar functions.
> (l) Any moisture and/or chemically resistant lining (sheet or fluid applied) installed to contain (or supplement containment) fluids and/or slurries in connection with the following: Reservoirs, ponds, Lagoons, Tanks, Sluices/Troughs/Aqueducts, Pipes and Land Disposal Facilities including Liners and Covers; and
> (m) Application of any material used to stop, deter, protect or contain water or moisture.

The Petitioner submitted the "Constitution & By-Laws United Union of Roofers, Waterproofers & Allied Workers" which lists the work performed by roofers, in Article II, Section 5, and states:

> All tear-off and/or removal of any type of roofing, all spudding, sweeping, vacuuming and/or cleanup of any kind and all areas of any type where a roof is to be relaid, or any materials and operation of equipment such as kettles, pumps, tankers, or any heating devices that are used on roofing or waterproofing systems coming under the scope of jurisdiction as outlined in Article II.

Article II, Section 3, describes the work performed and materials used by "composition" roofers:

> All forms of plastic, slate, slag, gravel, or rock roofing, including all types of aggregates, blocks, bricks, stones or pavers used to ballast or protect Inverted Roof Membrane Assembly (IRMA) roofs or roofs of similar construction where the insulation is laid over the roof membrane.
> All kinds of asphalt and composition roofing.
> All kinds of coal tar pitch and coal tar bitumen roofing and waterproofing.
> All priming of roof decks and surfaces that receive roofing and/or waterproofing.
> All rock asphalt and composition roofing.
> All rock asphalt mastic when used for damp and waterproofing.
> All prepared paper roofing.
> All mineral surfaced roofing, including 90lb., and SIS, whether nailed, mopped with bitumen, or applied with mastic or adhesive.
> All compressed paper, chemically prepared paper, and burlap when used for roofing, or damp and waterproofing purposes, with or without coating.
> All substrates used on the roof deck for fireproofing or any materials used as a support for the roofing system over fluted metal decks.
> All damp resisting preparations when applied with a mop, brush, roller, swab, trowel, or spray system inside or outside of building.
> All damp course, sheeting or coating on all foundation work.
> All tarred floors.
> All waterproofing of shower pans and/or stalls.
> All laying of tile or brick, when laid in pitch, tar, asphalt, mastic, marmolite, or any form of bitumen.
> All forms of insulation used as part of or in connection with roofing, waterproofing or damp-proofing.
> All forms of protection boards, walkway pads and roof treads used in composition roofing or waterproofing to protect the membrane from damage.
> All types of surface coatings, toppings and finishes used on the roof surfaces.
> All types of aggregates, stones, bricks, blocks, or pavers used as a ballast or protection for composition and Inverted roof Membrane Assembly (IRMA) roofs.
>
> Section 4. (1) All forms of elastomeric and/or plastic (elasto-plastic) roofing systems, both sheet and liquid applied, whether single-ply or multi-ply. . .

(GX 16).

*Roofers' Manuals*

The Petitioner submitted a "Roofers' Safety & Health Manual" prepared by the United Union of Roofers, Waterproofers & Allied Workers. (GX 17). It refers to the hazards of work involving the "kettle," the "tanker", buckets used to carry hot stuff, lifting roofing materials, electrical lines, LP gas, unguarded machinery, hoists, conveyers, ladders, coal tar, asphalt, motor-propelled graveling buggies, power brooms, primer spray pumps, hot air welders, set-up, tear-off operations, hot roof application, slagging and flashing and clean-up. It defines "set-up" as "raising ladder, hoisting roof equipment and materials." "Hot roof application" is defined as "spreading hot, laying insulation, setting felts." "Applying flood coat and gravel; constructing waterproof joints between roof membrane and wall, ducts, etc.," is considered " slagging and flashing." "Clean-up" consists of "lowering equipment, loading materials, etc.

The Petitioner submitted various chapters of a 1997 "Built-Up Roofing, National Apprenticeship Program" manual prepared by the United Union of Roofers, Waterproofers & Allied Workers. (GX 18). It describes roofing tools and equipment, including roof and gravel removal equipment; refers to the operation and repair of the equipment, various hoists and conveyors; roofing materials, such as felts, ply sheets, base sheets, vapor barriers, insulation, cap sheets, hot asphalt, sealants, surfacings, aggregate and coatings; planning, preparing; installation of walkways, flashings (usually laid by two persons), curbs, control joints, expansion joints, scuppers, drains, pitch pockets, and penetrations (pipes); step-by-step execution of the roofing work, including roof/gravel removal and installation, emergency repairs, leaks; and, recovery versus replacement of a roof.

*Wage and Hour Calculations*

The Petitioner introduced two exhibits showing the hours worked by each underpaid employee for various weeks of the contract, the wage amount actually paid, the amount which should have been paid, the difference between the two wages, the back wages due and a summary of the totals due for all the employees. (GX 36 & 37). The Petitioner's first calculation of $5650 due related to the Naval Reserve contract (GX 36) was increased to $6219.86 (GX 37) based on its resolution of the discrepancies raised by the Respondents.

Air National Guard Contract Documentary Evidence

*Certified Payroll Records*

The Respondents' certified payroll records signed by Mr. James Thomas, for Contract No. F36629-93-C-0007, Pittsburgh Air National Guard, show that the following employees held the positions indicated as well as reflecting their weekly hours worked and pay:[32]

| | | |
|---|---|---|
| *Russell E. Beck-laborer* | *Robert Hutton-laborer* | *Kevin McCreight-laborer* |
| *David J. Black-laborer* | *Michael Jones-laborer* | *John T. McMorris-laborer* |
| *Marvin Brown-laborer* | *Irvin Kelley-laborer* | *Michael Messner* |
| *George Delp, Jr.-laborer* | *Bernard Kirley-laborer* | *Stanley Peterson-laborer* |
| *Joseph Kletzli-laborer* | *Frank Robson-laborer* | |
| *Roger W. Faith-laborer* | *Stephen Kurtz-laborer* | *Frank Scapes-laborer* |

[32] Those whom the DOL alleged were underpaid are in italics. Question marks denote concern over the proper spelling of the employee's name.

| | | |
|---|---|---|
| *Eric J. Gritter?-laborer* | *Robert L. Lagerski-laborer* | *Vincent R. Shaw-laborer* |
| *Joseph Harris-laborer* | *Robert J. Leach-laborer* | *Glenn Szclulski-laborer* |
| *Hugh P. Hootman, Jr.-laborer* | *James Lowery-laborer* | James Thomas-Owner |
| *Earl D. Hoy-laborer* | *Ronald Lowery-laborer* | John Diaz-supervisor/roofer |
| *Richard Donophan-roofer laborer*[33] | Elger Lemelle-roofer | |
| | Richard Bednarz-manager | |
| Anthony Hankerson-roofer | Michael Messner-laborer | Bill Jackson-owner |

Not one roofer was listed on the payrolls between 12/17/93 and 6/3/94, when supervisor John Diaz was first listed as a "roofer." (GX 20). Mr. Diaz was then subsequently listed as a "supervisor/roofer." (GX 20). No "roofers," other than Mr. Diaz were listed on the payrolls after 6/3/94. The contractor's Daily Reports signed by Mr. Diaz, described below, do not identify Mr. Diaz as a "roofer" at any time.

*Daily Reports to Inspector*

The Petitioner submitted the Respondents' "Daily Reports to Inspector" from October 22, 1993 through June 15, 1994. (GX 27 & 27A). These reports appear to have been handwritten, on Thomas & Sons Contractor's Daily Logs, by the Respondent's superintendent, i.e., John Diaz, then many were summarized, typed prior to submission on "Daily Reports". They described the number and trades of the employees, the total hours worked and identified their employers. The reports also described the location and type of work performed. The following employees, trades and employers are identified:[34]

| | | |
|---|---|---|
| John Diaz-supervisor | *Vic Shaw-laborer* | *Roger W. Faith-laborer* |
| *Rick Donophan-roofer*[35] | *David Black-laborer* | *Hugh P. Hootman, Jr.-laborer* |
| *Bob Hutton-laborer* | *Kevin McCreight-laborer* | *George Fath, Jr.-laborer*[36] |
| *Bob Leach-laborer* | *Frank Robson-laborer* | *Glenn Szclulski-laborer* |
| *Joe Kletzli-laborer* | *Stephen Kurtz-laborer* | *Russell E. Beck-laborer* |
| *Earl Hoy-laborer* | *Frank Scapes-laborer* | *John T. McMorris-laborer* |
| *Mike Messner-laborer* | Hugh Perry-laborer | |
| *Ron Lowery-laborer* | *George Delp, Jr.-laborer* | |

The Daily Reports list the following tasks sequentially for the gym and building 419:

Gym: remove metals on top of building 120, gravel stop, fascia; build chute for dumpster; remove and replace squares; shovel snow off roof, repair leak in gym roof; remove & replace drain; completed both canopies, started flashing over cricket on top of weight room; flashed building 120 crickets/vent hatches; build dumpster cute, building 419; load roof; new metal gravel stop, fascia delivered, cleanup & unloaded truck; removed & replaced squares, asbestos removal; load

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[33] Worked as roofer 20 hours week ending 12/2/93.

[34] Italicized names are workers allegedly underpaid.

[35] Listed as a "laborer" on: 12/20/93 for "cleaning load roof with materials;" on 12/27/93 for "cleaning floors (removed tar that was tracked in building);" 12/29/93 for "removing & replacing coping and plastering gym bathroom wall;" and, 12/30/93 for "sand gym walls, paint walls, put on 2nd coat clean tar off lobby floor where loader was installed;"

[36] Probably Roger Faith.

material; clean debris on building; install metal fascia, gravel stop; install crickets; remove & replace roof; remove tar from bath & locker rooms; clean up roof; remove and replace roof; loaded stone on roof; remove/replace coping; clean floors (removed tar); removing & replacing coping and plastering gym bathroom wall; sand gym walls, paint walls, put on 2nd coat clean tar off lobby floor where loader was installed; mobilize to set up on building 419. (GX 27).

Building 419: mobilize to set up on building 419, change plug on kettle motor, fix hose; remove reglet from mason walls, clean track cut wall; start rubberroid front section, cut drive it & padded with fiber board, recant and 2-ply; continued rubberroid, removed old coping, cut it, installed cant 2-ply rubberroid, nailed top of rubberroid; removed cant and ply, removed fiberboards, cut it up, installed nailers, installed cant 2-ply; rain, cleanup, meeting on leak under a/c unit; removed rubberroid, removed cant, cut drive it, installed nailer, recant 2-ply and rubberroid, install termination bar; removed old rubberroid, old cant, installed nailers, cant 2-ply rubberroid and termination bar; fired kettle up, two men cleaned tar from floor; open up & removed rubberroid, temporary sealed, men worked on drywall, building 120; remove temporary seal; remove old cant, remove tons of cement, cut out ply, installed fiberboard to pad, installed cant 2-ply, cleaned metal, removed . . ., clean out track; clean up inside building 419, remove tar from bathroom, locker room hallway (no work on roof); clean metal, pump out water, clean debris around building; remove rubberroid on back wall, removed and installed cant, two men cleaning metal; washed front of building 120 where tar spilled on wall; open up & sealed drains, cleaned up inside, caught water in the panels; washed building 120 section where we loaded material; six men on roof cleaning gravel, three working on roof drains, washing stones; removing ply, putting crickets behind rubberroid, working on drains; wash roof down preparing for graveling, corrected roof area; began graveling; swept back rocks; finished two coats of gravel; cleaned gravel on ground; washed stones on ground; loaded top section for graveling, laid out walk pads, cut back pitch to drains, fixed rubberroid, remove excess bitumen; washed roof area, removed debris, corrected fish moots; pulling hot up by hand, swept back gravel, cleaned stones; loaded stones on roof; cleaned up debris that blew on runway and around building, washed stones, loaded roof with stones; washed stones, replaced coping building 419, remove debris building 120 and put in dumpster; started gravel building 120, washed and loaded stones; cut back areas where scuppers drain, loaded stones; corrected problems lower roof, remove/replace weak spots; pitch lower roof to drain; rubberroid top of building 120, paint hatches & vent, broom excess stones; install stand for fire alarm, started washing building 120; loaded truck, clean gym floors; wash outside building 120, clean up debris around buildings; clean sidewalk behind building 419; returned lumber to 84; started metal closures, remove old coping, install coping & closures, finish power washing concrete and curbs.

On nearly every day involving only "removal and replacement of roof" at the gym, the only "roofer" listed was Rich Donophan. There were many days when Mr. Donophan was listed as a "laborer," as noted above. (Not one roofer was listed on the payrolls between 12/17/93 and 6/3/94, when supervisor John Diaz was first listed as a "roofer." (GX 20).) One or more roofers were identified on the Daily Reports between 10/22/93 and 11/16/93. No roofers were listed for 11/19/93-11/25/93 when the workers loaded metal, cleaned debris, and, installed metal fascia and gravel stop. After 11/26/93 generally Rick Donophan was identified as the only "roofer" on the job. Rick Donophan was listed on the Daily Reports as a roofer on 12/17/93 and 12/23/93. This discrepancy between the Payroll and Daily Reports shows Mr. Donophan was not paid as a "roofer" for his work described as a "roofer" on at least two occasions aside from the general issue in this case.

No "roofers" were identified on the Building 419 handwritten Daily Reports between

4/1/94 and 6/15/94 when roofing work was performed. Mr. Diaz discontinued describing the workers' trades on the Daily Reports on 5/26/94. Mr. Diaz never described his trade as a "roofer" on the Daily reports. It appears there was no roof work done between 6/6/94 and 6/15/94. (GX 27A).

These Daily Reports and Payroll records clearly establish that individuals performed various work on the roofs of both buildings, under the contract, and were neither identified nor paid as "roofers." They also show that workers were utilized and paid as "roofers" and "laborers" at various times. The Daily Reports establish workers were identified and paid as "laborers" when "roofers" work was performed, such as removing and replacing coping, cleaning roof, removing and installing rubberroid, cutting and driving rubberroid, padding with fiberboard, recanting and installing 2-ply roofing material. They also establish that "laborers" were utilized on days when the only listed task was "removal and replacement of roof."

*1992-1994 Union Agreement-Roofers' Local No. 37*

The Petitioner submitted the 1992-1994 Union Agreement Between the Individual Roofing Contractors of Pennsylvania and the United Union of Roofers, Waterproofers and Allied Workers' Association, Local No. 37, applicable to Western Pennsylvania, including the site of the contract at issue, Allegheny County. (GX 28, Article III, Section 1). Article IV of the Agreement sets forth the work jurisdiction of "roofers" as including:

> All forms of plastic, slate, slag, gravel roofing;
> All rock asphalt and composition roofing;
> All prepared paper roofing;
> All compressed paper, chemically prepared paper and burlap when used for roofing or damp and waterproofing purposes, with or without coating;
> All damp resisting preparations when applied with a mop, three-knot brush, roller, swab or spray system in or outside of building;
> All forms of insulation used as part of or in connection with roofing, waterproofing or damp-proofing;
> All types of aggregates, blocks, or stones used as a ballast for Inverted Roofing Membrane Assembly roofs or roofs of similar construction where the insulation is laid over the roofing membrane;
> All sealing or caulking of seams and joints on these elastro-polymer systems to ensure watertightness;
> All priming of surfaces to be roofed, damp or waterproofed, whether done by roller, mop, swab, three-knot brush, or spray system;
> All applications of protection boards to prevent damage to the dampproofing or waterproofing membrane by other crafts or during backfilling operations;
> All handling of roofing, damp and waterproofing materials;
> All hoisting and storing of roofing, damp, and waterproofing materials;
> All types of resaturants, coatings, mastics, and toppings when used for roof maintenance and repairs;
> All tear-off and/or removal of any type of roofing, all spudding, sweeping, vacuuming and/or cleanup of any and all areas of any type where a roof is to be relaid, or any materials and operation of equipment such as kettles, pumps, tankers, or any heating devices that are used on roofing or waterproofing systems coming under the scope of jurisdiction as outlined in Article IV is to be applied.

The Petitioner introduced the "Constitution and By-Laws, United Union of Roofers, Waterproofers and Allied Workers," Adopted October 18-22, 1993. (GX 29). The jurisdiction of the Union set forth in Article II provides the pattern for the jurisdiction claimed by Local No. 37 and the language is nearly identical. Its "jurisdictional" language is nearly identical to the 1988 version set forth previously. (GX 16).

*Pre-performance Conference and*
*Information on Construction Contracts*

Mr. Fred Shamonsky, the Contract Administrative Officer, testified that he went over a Pre-performance Conference checklist with the Respondents and provided them with a document entitled "Information on Construction Contracts" which contained explicit information concerning labor standards in Part II. (GX 22 & 23). Part II of the checklist reflects Mr. Shamonsky discussed labor standards, including the correct classification of workers, with the Respondents. (GX 22). In addition to directing the Respondent to report any actual or potential labor dispute to the contracting officer, the "Information on Construction Contracts" document states, under Davis-Bacon Act Applicability:

> According to the Davis-Bacon Act, all laborers and mechanics working under Government contract must be at least paid the wage rate and fringe benefits in the U.S. Department of Labor wage determination for the classification of work performed, without regard to skill, except as provided in the clause entitled, '*Apprentices and Trainees*.' For those laborers and mechanics performing work in more than one classification, they may be compensated at the rate specified for each classification for the time actually spent in that classification. The employer's (prime contractor's) payroll records must accurately reflect the time spent in each classification in which work is performed . . .

*Air Guard Contract Correspondence*

On August 13, 1993, Mr. Shamonsky, sent a "Notice to Proceed" with work under the contract to the Respondents. (GX 25). Among other things, it informed them "Labor Standard Provisions applicable to contracts over $2,000.00, including wage rates, apply to work under this contract."

On December 21, 1993, about mid-way through the contract performance, the contracting officer wrote to the Respondents advising them that the DOL had informed him several subcontractor employees had complained about: (a) nonpayment for work; (b) health insurance deductions; and, (c) "Mis-classifying employees as laborers . . . performing roofing work, however not classified as roofers nor did they receive that rate." Mr. Shamonsky advised funds would be withheld pending resolution of the matter. (GX 26).

The Respondents replied to Mr. Shamonsky's December 21, 1993 letter, on December 28, 1993. (GX 31). They wrote, "With respect to item c, we are not aware of any misclassification and emphasize that these workers were hired as laborers. Again, we were aware of the situation prior to your letter and had already undertaken action for resolution." (GX 31).

The Respondent introduced a letter from Mr. Thomas, dated August 24, 1994, to Construction General Laborers, Local Union 373, Pittsburgh, PA, thanking Mr. Flaherty for

sending him a copy of the "Project Agreement" including appropriate labor rates.[37] (RX 4). The "Project Agreement" in blank form and signed by the Pennsylvania Laborers' Union representatives was submitted by the Respondent as well. (RX 3). Writing in the future "tense," Mr. Thomas states his intention to use a crew of "laborers" to remove a roofing system, handle general material and clean-up, but that his own crew would reinstall the new roof. He calculated "common laborers" rates of $19.61 per hour. He asked Mr. Flaherty to sign the confirmation at the bottom of the letter and fax it back. It appears Mr. Flaherty did so, however, there is no evidence establishing the authenticity of his signature.

The Contracting Officer wrote to the Respondents' former counsel, on March 21, 1995, responding to her earlier letter of March 3, 1995 concerning the withholding of contract payments. (GX 32). He wrote that the DOL had initiated a formal investigation of the Respondents, on June 14, 1994, because it had discovered it improperly paid 28 workers as a result of classifying "roofers" as "laborers" and owed approximately $20,239.41 in back wages. Mr. Shamonsky said the DOL disagreed with the Respondents' claim that the area practice was for "laborers" to perform the work. He reiterated that the DOL had given the Respondents 30 days to remedy the matter and would seek withholding of funds if it was not resolved by then.

The Petitioner submitted a letter from Miller Thomas Gyekis, Inc., dated February 9, 1995, to the United Union of Roofers, Waterproofers and Allied Workers' Association, Local No. 37, certifying they had used Union roofers and apprentices, in 1994 and 1995, for the "removal of existing roofs where replacement is required." (GX 30). They referred to many non-government contracts and one with the U.S. Postal Service.

*Wage and Hour Calculations*

The Petitioner introduced two spreadsheets showing the hours worked by each underpaid employee for each week of the contract, the wage amount actually paid, the amount which should have been paid, the difference between the two wages and the back wages due for both the respondent and his subcontractor, Bill Jackson Roofing. (GX 35). The total back wages allegedly due from Bill Jackson Roofing, the Respondents' subcontractor, is $4,266.67 and $22,812.40 from Thomas & Sons.

*Other Exhibits*

The Respondents submitted a document "Part 22-Application of Labor Laws to Government Acquisition," which contained "22-404-2 General requirements" and "22.404-3 Procedures for requesting wage determinations."[38] (RX 5). The Respondents' purpose in introducing the document was to show that it is the contracting officer's responsibility to ensure the contract solicitation contains the appropriate wage determination. General wage

[37] I admitted the letter over the Petitioner's "authenticity" objection. Comparing the signature with known signatures of record, I find Mr. Thomas signed the document. Mr. Quarantillo did not recognize Mr. Flaherty's signature. (TR 608). However, since the document is dated and has facsimile dates after the conclusion of the subject contracts, I afford it little probative weight. I also note the document was faxed from the Respondents' fax machine telephone number to the Union on August 24, 1994.

[38] I admitted it over Petitioner's objection that it was merely a statement of law. The document appears to contain FAR extracts.

determination DE91-2 applies to "building and heavy" construction.[39] (GX 1). Wage determination PA930001 applies to "building" construction. (GX 21). The FAR provisions provide that when the nature of a project is not clear examination of other factors is needed, primarily area practices, and if there is doubt as to the proper application of wage rate schedules to the type of construction, guidance shall be sought from the DOL.

Employee Testimony

*Naval Reserve Contract*

Christopher Labouseur was employed by the Respondents for about one month, in the summer of 1992, working on the Naval Reserve contract. (TR 21, 27, 38). Mr. Labouseur had worked as a non-union roofer for about four years all over New Jersey before this job. (TR 29). He worked ripping off the old roof and putting on a new roof. (TR 21-22, 29). He worked the "kettle" on the ground after the kettleman was hurt, "prepped" the roof area, put fiber board or insulation down, helped install flashing on the roof or walls above the gym, and like everyone else he observed, helped clean up at the end of each day. (TR 21-22, 24-26, 36). He observed other employees ripping off the old roof and installing the new one. (TR 25). He testified that Mr. Vannote, of Vannote's Roofing, was his supervisor on the site and he worked for Mr. Vannote. (TR 28, 34). He saw Mr. Vannote perform roof work too. (TR 33). He also was supervised by "Patsy" the Respondents' supervisor on the flashings work. (TR 28, 41). Mr. Labouseur testified "a lot of guys were on the roof, about ten." (TR 34-35, 38). He knew three of his coworkers, Ed Vollrath, Gary DeDeux, and Bill Porvasnick before this job. (TR 35). He could not say who used the mop, but he did not. (TR 23-24). Finally, he added he was paid directly by the Respondent in Lakehurst, New Jersey. (TR 39-40).

Tracy Scarpulla was hired by Bob Vannote as a "roofer" to work the Naval Reserve gym roofing job contract and worked about three to four weeks, in the Spring. (TR 44, 50). He had about seven years experience as a roofer. (TR 47). His job was to "prep" the roof, tear the old roof off and put the new one on. (TR 44-45, 48-50). There were about ten guys on the job all of whom worked on the roof. (TR 47). His coworkers included: Gary DeDrew, Eddy Volrath, Mike, Chris Labouseur, Bob Vannote, and, James Vick, all of whom worked on the roof. (TR 54-55). He spent about three hours a day ripping off the roof but did not mop or install flashing. (TR 45-46, 51). He helped clean up at the end of the day, about an hour on the ground, with the rest of the crew. (TR 46, 53).

Michael Sinkiewicz was hired by Mr. Vannote to work the Respondents' roofing job. He worked the job about two to three months in 1992. (TR 56-57, 63). He tore off the roof, cut, ripped and replaced roof sections, rolled plies, installed flashings, and cleaned up on the roof and ground at the end of the day. (TR 57-60). It was "pretty much" a group effort where the others rolled tar, cleaned pipe and installed insulation. (TR 61). Out of ten guys, seven to eight worked on the roof, one ran the kettle on the ground, and two ran around. (TR 62, 64). There were moppers, roller, rhinomen, a kettleman, and runners. (TR 65-66). Most, except two who had their own company, worked for Vannote. (TR 64). He never ran the kettle. (TR 65). Mr. Sinkiewicz was paid directly by the Respondents. (TR 67). Patsy and "Rich" were the Respondents' job supervisors, but Patsy did not give him directions. (TR 71). He did not know

[39] FAR 22.404-2(c) furnishes general guidance from DOL's Wage & Hour Division for use in selecting the proper wage schedule by defining various types of construction, i.e., "building," "residential," "highway," and, "heavy." Although not necessary for my holding, I find the proper schedule was used for both projects.

his work "classification" and never saw a wage rate bulletin there. (TR 67, 70).

*Air Guard Contract*

Nine of the Respondents' former employees testified. None of the other employees remembered any employer form presented for signature on pay days encouraging employees to raise any wage grievances with the DOL. Many of the employees had some roofing experience, but most did not and were not union members. Most were aware that "roofers" were usually paid more than "laborers," but since they were satisfied with their wages they did not complain. Most, except Mr. Scapes, never saw any posted "prevailing wage determination" although the contracting officer had posted it in the gymnasium. Most did not work the full term of the contract although at least two worked on both the gym and operations buildings roofs.

The Respondents' counsel asked each employee about the details of when they were first contacted by the DOL or the contracting agency about this "misclassification/wage" issue. Several testified that the contracting officer (Fred Shamonsky) or a DOL representative had discussed it with a group of employees near the end of the job, had interviewed them and taken written statements from some of them.

All the testifying employees agreed Earl Hoy was the primary "kettleman," but that many others had tended the kettle as well. Most agreed there were usually two people mopping, one of which was primarily Ron Lowery. Everyone cleaned the gravel which was later spread on the roof and spread or raked the gravel with a machine or rake. All but two, who had prior "roofing" experience, cleaned debris from the roof by carrying it to a chute and sending it down the chute to the dumpster on the ground. Most also cleaned up debris on the ground which had fallen or been thrown to the ground, usually at the end of the work day. At least two of the workers had to clean inadvertently spilled or "tracked" tar off of walls or sidewalks. All the employees agreed that most of the workers (all but one usually) were performing tasks on the roof during the workday. These tasks included: tearing off old rubberroid, paper, tar and insulation; removing the roofing to the decks; carrying bundles to the roof from the ground; bringing hot tar from the kettle on the ground to the roof using a bucket and/or crane in the early stages; carrying the hot tar across the roof; rolling plies of paper; laying rubberroid; mopping hot tar; shoveling gravel into the crane bucket to be lifted to the roof; moving and spreading gravel with a machine or rake; installing flashings and copings; installing a walkway on the roof; repairing leaks or doing "patch work;" and, most operated or light the kettle once or twice. Only one or two operated the crane used to lift materials from the ground to the roof.

Robert Hutton was employed by the Respondents for about four months to work on the Air National Guard contract during the Fall and Winter of 1993, August or September through January 1994. (TR 352, 358, 360, 370). John Diaz, the Respondent's supervisor organized and assigned the tasks. (TR 357, 364). The work he performed included tearing off the roof, installing flashings and insulation, rolling paper, and running the "mop" with hot tar from "pigs." (TR 352-5). He mopped about two hours a day, but not every day. (TR 364). There were always two people mopping. (TR 368). While on the roof, he would remove debris from the tear-off and send it down a chute from the roof to a dumpster on the ground. (TR 355). At the end of the day he would help clean up debris. (TR 356). He never tended the "kettle." (TR 356). He observed others on the work crew, i.e., Tuffey and Mike, perform similar tasks. (TR 356-7). Mr. Hutton testified he never saw any one working solely on the ground. (TR 356). Like all the other employees, he did not remember any employer form presented for signature on pay days encouraging employees to raise any wage grievances to the DOL. (TR 358). Mr. Hutton

had about eight years previous experience as a non-union roofer. (TR 361-2). He saw Robert Leach light the kettle. (TR 363). Bill Jackson was the "kettleman" before Mr. Leach and afterwards, Robert. (TR 364).

Hugh P. Hootman was employed by the Respondents to work on the Air National Guard contract during the Spring and Summer of 1994. (TR 376, 382-3). Mr. Hootman was a carpenter who had experience installing about twelve commercial and residential roofs. (TR 384). His job was to finish the roof, although he did not remember the number of plies he installed. (TR 396). He said he performed "roofing" tasks, tearing off rubberroid, such as mopping, installing downspouts, fitting flashings, laying rolls of roofing paper and rubberroid, putting rocks (or gravel) down on the roof and installing a sponge-type walkway on the roof. (TR 376, 378, 397). His tools included a carpet knife, hot mop, chalk line, hammer, tape measure to ensure the roofing paper plies were straight, and swab.(TR 377). Mr. Hootman also operated a crane to lift gravel from the ground to the roof. (TR 377). He and others cleaned up debris from the roof. (TR 379). He said there were lots of leaks requiring repair thus he had to tear off and reinstall rubberroid. (TR 380). Although the site was "ship shape," he had to clean up the job site and sidewalks, but not on a daily basis. (TR 400). Mr. Hootman observed others, i.e., Ron Lowery, Frank Robson, Larry, Earl, and Vince, do the same jobs he did, such as spreading tar and rubberroid on the roof and cleaning up. (TR 380-1). He testified usually Earl would tend the kettle. (TR 380, 398). He did not remember any employer form presented for signature on pay days encouraging employees to raise any wage grievances to the DOL. (TR 386).

Michael Messner was employed by the Respondents to work on the Air National Guard contract during the Fall of 1993 and Spring of 1994, although it might have been August through September 1994. (TR 402, 410). He had no "hot" roofing experience, but Mr. Diaz, Respondent's supervisor who hired him, said he would learn everything he needed to know on his first day. (TR 411). Mr. Messner worked on both the gym roof and the operations building roof. He testified he worked dawn til dusk tearing off the roofs and closing up what they had opened. (TR 402). His tasks included carrying supplies, a lot of tearing off the old roof, removing the debris from the roof via the chute to the dumpster, mopping, rolling paper, install flashing and putting the new roof on. (TR 403-406, 413-415). He, like the others he saw, had to clean up debris both on the roof and on the ground. (TR 406-8, 415). He described the tools he used including a gas power saw. (TR 404). Mr. Messner testified Earl, the kettleman, usually stayed on the ground and that he too had operated the kettle for one and one half days. (TR 408, 417). He said the crew included: Bob, Ronny, Earl, and John Diaz, the supervisor. (TR 409).

Bernard Kirley was employed by the Respondents for about three weeks to work on the Air National Guard contract during the Fall of 1993. (TR 425, 432). He worked the "tail end" of one roof and started the second. He is a "roofer" and was hired as a "roofer." (TR 425, 431). He assumed he would be paid roofer's wages but did not ask questions because he was glad to get any wage and had thought one worker was fired for complaining. (TR 435-6). His tasks included tearing off and installing roofing. (TR 425, 433-4). The roofing was removed to the deck. His tasks included mopping, rolling out roof plies removing debris from the roof, and cleaning up at the end of the day. (TR 426-7). He observed others do the same and thought most of the others were "roofers." (TR 428). His major task was rolling out the roofing and he would relieve Tuffey mopping occasionally. (TR 426-7, 432-3). He did not remember any employer form presented for signature on pay days encouraging employees to raise any wage grievances to the DOL.

Frank Robson was employed by the Respondents for about three months to work on the

Air National Guard contract during the Spring and early Summer of 1994. (TR 445, 452). While he had learned some roofing at trade school, he had no previous experience. (TR 452). He worked on both roofs. His job included cutting off rubberroid, doing patch work, i.e., filling holes, washing gravel, laying "hot," laying rubberroid, primarily spreading gravel on the roof, fixing downspouts, and once in awhile picked up roofing debris on the ground. (TR 446, 448, 451, 454). He mopped once or twice but never tended the kettle. (TR 450, 454). His coworkers included: Frank, Dave, Jim Lowery, Earl Hoy, and Vince. (TR 449). He observed Dave performing the same types of work as he performed. (TR 450). Just about everyone operated the gravel spreading machine. (TR 449). He testified he spent about 70% of his time on the roofs and 30% of his time getting supplies. (TR 456-7).

Vincent Shaw was employed by the Respondents to work on the Air National Guard contract for about three months during (February) the Spring and Summer of 1994. (TR 463, 471). He testified his duties included pulling tar in a bucket or roller, mopping hot tar, carrying bundles across the roof, lighting the kettle, rolling paper, installing drains and stainless, spreading and raking rock, washing rock, carrying bundles up to the roof, replacing ceiling pans, painting, working with flashings and coping, hanging drains, replacing "messed up" drywall and ceiling panels, and, removing roof debris via the chute. (TR 464-465, 470-471). He observed other crew members doing the same type of work including carrying tar up to the roof until a pipe was later installed. (TR 467). Mr. Shaw testified there was no one person assigned to perform work on the ground. (TR 467-8). The tools he used included a "zsa-zsa," mop, carrier/bucket, gloves, and drill. (TR 465, 468). Mr. Shaw was primarily involved with the tear off and replacement of specific roof sections after the new roof had been installed. His main job was to lay rocks, put tar down, to roll out the rocks and rake them. (TR 472). On the ground, he would wash rocks, swept the street, and pickup debris thrown down from the roof. He operated the kettle four times or days. (TR 473). He did not remember any employer form presented for signature on pay days encouraging employees to raise any wage grievances to the DOL. (TR 479-482). Mr. Shaw said Mr. Diaz would send Mr. Robson away to get materials when the DOL representative was there. (TR 478).

Most disturbingly, were Mr. Shaw's answers to the Respondents' cross examination. He testified that John Diaz told the workers what to tell the DOL if they wanted to go to the next job. (TR 483). They were to say that they worked on the ground 90% of the time on the job. (TR 483). Mr. Shaw said he was being paid $18.00 per hour. (TR 479).

John T. McMorris was employed by the Respondents for about eight to nine weeks to work on the Air National Guard contract during the Spring and early Summer of 1994. (TR 485, 491). He had no prior roofing experience. (TR 492). He testified he worked on the roof, carrying materials, shoveling and raking gravel, carrying hot tar from the tube to the work area, moving gravel in a wheelbarrow, changing tanks on the kettle and lighting it up, load gravel in the bucket and crane it up to the roof, remove tar from stainless steel, remove paper and tar from the roof, throw it off the roof and clean up afterward. (TR 486, 493). He would wheelbarrow the fallen roof debris to the dumpster and clean tar from the sidewalks. (TR 488-9, 494). He did not roll paper or mop. (TR 487, 493). Usually, there were eight to nine men on the roof, but he did not count them. (TR 497). His coworkers included: Vincent Shaw, Dave, Earl, "Hook" and Ron.[40] He observed them doing the same type of work as he had performed plus mopping. (TR 490-491). He and Vince fired up the kettle daily. (TR 487, 493). He said Earl primarily stayed on the ground and ran the kettle. (TR 490).

[40] It appears "Hook" may be Earl Hoy.

Mr. McMorris, whom I found very credible, testified that John Diaz told him to tell the DOL that he had spent only one to two hours on the roof "if he wanted to keep his job." (TR 497, 499-500). So, he followed that advice and lied to the DOL as told, but that was not under oath. (TR 500-501).

Stephen Kurtz was employed by the Respondents to work on the Air National Guard contract for three to four months during the Spring and Summer of 1994. (TR 503, 513). He had many years experience as a non-union roofer and to this day works as a roofer. (TR 513-514). He testified that his tasks included putting on a hot roof, cutting rubberroid and applying it to the roof, running the kettle twice, cleaning, spreading and raking gravel, shoveling the gravel into a (crane) bucket on the ground, operating a crane to lift the gravel to the roof, disposing of the old scraps of rubberroid, and operating the gravel spreading machine. (TR 505-508, 510). He saw his coworkers, i.e., Hook and Frank, doing the same. Mr. Kurtz saw others sweep gravel and push the gravel spreading machine. Everyone cleaned gravel according to Mr. Kurtz. (TR 509-510). He never applied hot tar and was not required to clean up debris. (TR 511-512). However, Mr. Kurtz did dispose of scrap rubberroid. (TR 512). He testified "Hook" mostly ran the kettle and he only recalls seeing Ron mopping. (TR 511, 516).

Frank Scapes was employed by the Respondents to work on the Air National Guard contract for three to four months during the Spring and Summer of 1994. (TR 519, 529). He was and is now a "roofer." (TR 531). He was classified as a "laborer" on this job, was paid $18.11 per hour and thought it was the correct prevailing wage. (TR 532). The roof was basically installed when he arrived so he mostly did repairs to the roof necessitated because of leaks and tore off bad sections. (TR 522, 527, 539). His tasks included removing gravel, tearing up and re-doing drains and walls, carrying hot tar, operating the crane, hanging down spouts, repairing bad spots on the gym roof, removing and spreading gravel, mopping only once or twice, throwing debris from the roof, cleaning tar off with solvent, painting, down spout work and, installing rubberroid with a bucket of tar. (TR 520-23, 528). Mr. Scapes said basically everybody "did the same." (TR 525-6). He saw others use the mop if Ron was not there, but he hardly ever touched it. (TR 523). Ron Lowery primarily used the mop for leak repairs. (TR 523, 539). He did very little clean up and did not recall installing flashing. (TR 523-4). He testified that Earl was the only guy on the ground running the kettle and the rest, i.e., Vince, Lowery, and Dave, were on the roof. (TR 526). Mr. Scapes added, "No one had any one specific thing to do." (TR 526). He did not remember any employer form presented for signature on pay days encouraging employees to raise any wage grievances to the DOL.

## Agency and Union Testimony

### *Naval Reserve Contract*

Michael Mack was the U.S. Navy contract administration inspector/representative for the Naval Reserve roofing contract. (TR 75). His superior was Carl Hutchinson. (TR 93). He observed the removal and replacement of the roof one to four hours a day, once or twice a week, from March through August 1992. (TR 77, 80-81). Mr. Mack described the Construction Representative's Daily Reports he had prepared. (GX 13; TR 81-82). He identified the Contractor's Daily Reports (GX 14) which the contractor prepared and gave him in stacks. (TR 84-85, 95). He said those reports accurately reflect the work performed. (TR 86). He observed the Respondents had posted the wage rate bulletin in the construction trailer, but Jason Thomas

had informed him no roofers were allowed inside. (TR 88, 95). Mr. Mack identified the Respondents' supervisors as: Cager Brown, Jason Thomas, and later Pat Piaggio, all of whom had supervision over Mr. Vannote, the roofing foreman. (TR 88-89). He was aware Mr. Vannote had his own roofing business, but he was on the Respondents' payroll as an employee. (TR 89, 98).

Mr. Mack and Mr. Hutchinson met with the Respondents, Mr. Thomas, Rich Bednarz, or "Cager," around October 21, 1991. (TR 78). At the meeting, Mr. Hutchinson discussed Davis-Bacon Act compliance and said anyone working on the roof would be classified as a "roofer." (TR 79, 90). He made no notes of the meeting. (TR 98-99). He did not know where the notebooks he used to prepare GX 13 was, most having been tossed out when GX 13 was completed. (TR 100-103). On cross-examination, he admitted having done twenty-five roofing contracts, but did not believe the contract itself stated that everyone working on the roof must be classified as a "roofer." (TR 93-94). Mr. Mack first became aware of the all-encompassing definition of "roofer" at this October meeting. (TR 116).

Mr. Mack did not consider this job "demolition" work because the contract did not involve replacement of the roof deck itself. (TR 97, 112). He said the kettle was not always minded by the same individual. (TR 106). He observed two individuals operate the kettle, one of which was Chris Labouseur. (TR 107). Under the wage determination, there was a separate classification for the "kettleman" position. Mr. Mack opined that quite a few "kettlemen," in his experience, prior to this contract had been paid "laborers" rates. (TR 110). However, Mr. Mack had just returned from overseas. (TR 111). He did not know what a "pot tender" was. (TR 115).

Mr. David Harris is the President of Local Laborers' Union 199, Wilmington, Delaware. (TR 119). He is a twenty-six year union member. The Union's jurisdiction covers New Castle County, the site of the Naval Reserve contract. (TR 120). He testified no laborers are involved in roofing work unless the job is a "total demolition." (TR 120). Laborers are not involved in ripping off a roof or cleaning up roof debris either on the roof or on the ground. (TR 121-123). He did not know if the Respondents had contacted his Union about classification of workers. (TR 127).

Mr. David McBride is the Business Representative and President of the Roofers' Local 30 Union. (TR 312). He is a fifteen year union member. (TR 133). His main duty is the administration of collective bargaining agreements. (TR 132). His Local covers half of Pennsylvania, half of New Jersey, Baltimore-Washington D.C., and Wilmington, Delaware, including New Castle County. (TR 133). He testified if a roofing contract did not involve "total demolition" then it is "roofers'" work to remove an old roof and replace it. (TR 135). He identified the 1989-1994 Roofers' Union Working Agreement (GX 15) and observed Section 2 covers Wilmington, Delaware and Section 7i defines "roof." (TR 136-138). Mr. McBride testified that Section 5 of the document accurately defines roofing work. (TR 138). He identified the Constitution and By Laws of the International Roofers and noted Section 5, page 8, coverage. (TR 139-140). He testified that he had heard the testimony of Mrs. Scarpulla, Mack, Sinkiewicz, and, Labouseur, and the work they described is "roofers'" work. (TR 141). He said the following is roofers' work, in non-demolition roofing jobs: ripping off old roof; shoveling to clean the roof; use of all tools in roof removal; sweeping the roof; laying fiberboard; laying tar; rolling paper and plies; chipping tar; loading; operating the kettle and mop; clean up, and tar removal. (TR 142-144). He added, "we pretty much do it all for removing and replacing roofs. Laborers have no place." (TR 145).

Mr. McBride described roofers' tools as including: rhinos; wheelbarrows; hand tools; mop carts, etc. (TR 144-145). He reviewed several of the Respondents' Daily Reports for the contract and identified the work as roofers' work except for some "capping" sheet metal and "finishing" work. (TR 146-148). He was not aware whether the Respondents had contacted his Union regarding the union practices. (TR 149). He testified a "kettleman," usually a journeyman roofer, is under his union's jurisdiction even if not on the roof. (TR 163-164). He explained the roofers job is a "independent" and a "skilled" trade. (TR 164-165). Finally, he identified a roofing apprentice training manual (GX 18) and a Roofers' Safety and Health Manual (GX 17). (TR 169-171).

Jacqueline Phillips-Clark, who has been a prevailing wage monitor and public works specialist for the 25-member Roofing Contractor's Association for five years, testified. (TR 175-6). Her duties include filing grievances for the construction industry and sometimes for members. (TR 175, 185). She testified that there are over 100 signatories to Local 30 Roofers' Union, covering Eastern Pennsylvania, Delaware, and New Jersey. (TR 176-7, 185). However, the Respondent is not a member of the Association. Pat Moran was her predecessor. She identified GX 19 and GX 15. (TR 177, 179). Section 2, page 6, of the collective bargaining agreement between Local 30 and the Roofing Contractors" Association, accurately describes the jurisdiction and scope of the roofers' union. (TR 179). Section "I," page 7, includes removal and replacement of roofs as within their jurisdiction. (TR 180). She explained tear off in a demolition project is not roofers' work, but the following are: roof clean up; sweeping the roof; hauling debris; applying hot tar; rolling paper/plies; operating the mop; cleaning or chipping tar during the roof job; laying fiberboard; and, cleaning up material fallen from the roof. (TR 181-182). She identified GX 16 as the Constitution and By Laws of the International Roofers' Union. (TR 182). Section 5, page 8, accurately describes the roofers' union jurisdiction. (TR 183). She was not aware whether the Respondents had contacted her offices. (TR 183). However, she did not work there in 1992. (TR 184). The Respondents are not a member of the Association. (TR 193).

Carl Hutchinson was the supervisory construction representative for the Respondents' re-roofing contract with the Naval Reserve. (TR 205). His duties, at the time, included reviewing all construction contracts and solicitations, assigning contract representatives, conducting pre-construction conferences and visiting contract performance sites, such as the Philadelphia Navy Base and Reserve center, to ensure contract compliance. (TR 206-7, 254). He had 8-15 subordinates. (TR 253). He identified the Naval Reserve contract (GX 1 and 2) and said the contract called for removal of slag, membrane flashing, metal flashing, and insulation and installation of a new roof. (TR 208, 210, 212-215). On cross-examination, Mr. Hutchinson said he visited this job site. Although Mr. James Thomas was not on site, he discussed classification problems with Mr. Bednarz, who he assumed was a company official, an inference Mr.Bednarz did not dispel.

Mr. Hutchinson used the Pre-Construction Conference Guide (GX 3) as an outline in conducting the pre-construction conference, in August 1991. (TR 218, 260). Mr. James Thomas and Mr. Bednarz attended the pre-construction conference. (TR 219-220). Dave Cook and LTCD Patraca were also present. (TR 261). Mr. Hutchinson made the area practice clear to them. That is, in this contract, all workers on the roof were to be classified as "roofers." (TR 220, 261). On cross-examination, Mr. Hutchinson admitted he was familiar with the area practice years before this contract through his contact with the DOL, roofers' unions, i.e., Local 30, roofing contractor's associations, and experience. (TR 262, 271, 283-4, 321). He went over section 17, page 8 (GX 3), regarding payroll and fringe benefits and classification. (TR 222). His

initials appear in block 9 of GX 4, the Schedule of Prices. (TR 224). He identified the Payrolls and Statement of Compliance (GX 5) submitted to him by the Respondents. (TR 226). Normally, he would look for inconsistencies between the payrolls and prevailing wage determination and follow up on discrepancies. (TR 247-249).

Mr. Hutchinson testified that at an October 1991 meeting regarding a time extension, he reiterated to the Respondent that all workers were to be classified as "roofers" on this job. (TR 228, 306, 319). At a pre-roofing meeting, just before contract performance began, Mr. Hutchinson informed Respondents that all workers doing work on the roof would be classified as roofers. (TR 231, 318). This did not apply to other trades, such as masons, sheet metal workers, or electricians. (TR 291-292). He had also discussed the classification matter with Mrs. Bednarz and Piaggio. (TR 304-5).

Mr. Hutchinson identified GX 6, his 6/3/92 letter to the Respondents mentioning that the payrolls showed the employees were listed and paid as "laborers" and Mr. Vannote as an owner. (TR 229). Vannote's status and this classification matter were never resolved. (TR 292). GX 6 represented the first contact he had with the Respondents concerning payroll problems. Mr. Vannote is deceased now. (TR 293, 312). He further identified GX 7, 8, 9, 10, 11, and 12. (TR 232, 234, 236, 237, 239, 241). He identified LTJG McNiece as the project manager for the contract. (TR 236-7).

Mr. Hutchinson had contact with the DOL, including Mr. Durbin, concerning its interpretation of regulations. (TR 326). He identified his letter to Mr. Durbin (RX 2) and Mr. Durbin's 7/9/92 (RX 1) response to him. (TR 257-8). On cross-examination, Mr. Hutchinson said the general wage determination for this contract, DE 91-2 was current at the time and said nothing concerning classifying workers as "roofers." (TR 271). Since the Respondents' contract, he has handled 30-40 roofing contracts none of which state all workers on a roof must be classified as roofers. (TR 272). Before 1989/1990 laborers had been allowed, under 10-15 contracts, to do roofing. (TR 285-6). After 1989/1990 he informed contractors of the change which he had learned of in 1989/1990 from Mr. Durbin, DOL.(TR 289). Mr. Hutchinson related his infrequent contacts with Respondents before this contract. (TR 289-291).

*Air Guard Contract*

Mr. Walter Skrzynski, Roofers' Local 37, testified he had been the Union business representative for the past six years. (TR 542-3). The jurisdiction of Local 37 covers twenty counties in Western Pennsylvania, including Allegheny County, the situs of the Air Guard contract. (TR 543-4). On cross-examination, he added that the Union has about 250 members and eight signatory firms. (TR 569, 579). He testified that GX 28, page 6, sets forth the Union's area "jurisdiction" and Article IV describes "roofers'" tasks from 1992-1994. (TR 545-6). Local 37 is governed by the Constitution and Bylaws of the United Union of Roofers, Waterproofers and Allied Workers, adopted in October 1993. (GX 29; TR 547). Article II of the latter document governs the work jurisdiction of roofers. (TR 548). On cross-examination, Mr. Skrzynski said before the agreement in GX 28, the Union was governed by a substantially identical agreement and that similar jurisdiction had been claimed at least forty-five years. (TR 566). He explained that the term "total demolition" does not apply to replacement of a roof. (TR 549).

Mr. Skrzynski reviewed the work listed on the contractor's Daily Logs (GX 27), while on the witness stand, and testified other than installing sheet metal, it is covered by "our roofers'

jurisdiction." (TR 550-2). Those tasks included: removal of roof material; tear-off; applying tar and mopping "hot;" laying rubberroid; cutting rubberroid; tending kettle; rolling out paper on the roof; washing gravel to use on roof; transporting gravel from the ground to the roof; dumping and spreading gravel on roof; throwing debris from the roof into the chute; cleaning up roof debris on the ground; transporting supplies from the ground to the roof; repairing leaks; sweeping debris from the roof; raking rooks on the roof; carrying tar to the roof; removal and disposal of roof material; fastening insulation; and, cleaning up tar. (TR 554-556).

Mr. Skrzynski testified that the Roofers' Union is an "unassisted" trade, that is they do not utilize laborers' help. (TR 553, 557). He described the tools of a roofer as including: mops; screw guns; etc. (TR 556-9). Page 2 of the Roofing Apprentice Program (GX 18) accurately describes roofers' tools. (TR 559). He added that roofers' work includes: roof repairs; repairing roof drains; site clean-up; picking up supplies and materials; and, getting tools to the roof. (TR 560-2). On cross-examination, Mr. Skrzynski added that it includes: building chutes; shoveling snow; unloading trucks; and, removing tar if the roofers made the mess, but perhaps not plastering a wall, unless it was damages as a result of a roof leak. (TR 553, 557, 567, 584).

Mr. Skrzynski testified the Respondents had not contacted his Union regarding this jurisdiction. (TR 564). He said the 2/9/95 letter to the local from Miller-Thomas Gyekis, Inc., (GX 30) was a reply to his request for information from a signatory roofing contractor. (TR 562). On cross-examination, Mr. Skrzynski said the 7/12/90 letter from Mr. Robinson to the Department of Labor (GX 19) reflects the same policy in effect in "our" jurisdiction. (TR 573-5).

Paul Quarantillo has been the assistant to the business manager, Laborers' Council of Western Pennsylvania, for six years. (TR 594). The Council's jurisdiction covers thirty-three counties in Western Pennsylvania, including Allegheny County. (TR 594). They have about 12,000 members in Pennsylvania and 250-300 collective bargaining agreement signatories. (TR 599). The Council serves as the negotiating hub of fifteen union locals affiliated with it. It is his job to enforce the work jurisdiction of laborers. Mr. Quarantillo said the Laborers claim no jurisdiction in any job involving replacement or relaying of roofs, including repairing leaks and disposing of or cleaning up debris. (TR 595-6). He testified that the Laborers do not claim "jurisdiction" over roofing work because of the history of work in the area of the building trades. Essentially, the two unions agreed to agree. (TR 599, 615-6). This understanding had existed at least since 1976 when he joined the Union. (TR 615).

Reviewing the Contractor's Daily Logs (GX 27), Mr. Quarantillo testified that none of the work was under Laborers' jurisdiction, except removing tar from tiles and washing tar from walls on final cleanup. (TR 597). He said the Respondents had never contacted him. (TR 598). He did not recall any contact from the Defense Department or the Air Force concerning laborer jurisdiction before 1993, but was contacted by the DOL. (TR 601). The Council provides the DOL with copies of collective bargaining agreements to review for purposes of posting prevailing wage rates.

Mr. Quarantillo is familiar with Local 373, it is under the Council's jurisdiction. (TR 602). They oversee the locals and the latter might "coordinate" on extraordinary issues with him. Mark Flagherty, now retired, was the former business manager of Local 373. (TR 604). He testified that he is familiar with the (incomplete) Project Agreement Form, signed by Local 373 officials, shown him. (RX 3; TR 606). He had also been shown the 8/24/94 letter from the Respondents

to Mark Flagherty (RX 4) in preparation for the hearing.[41](TR 608). Mr. Quarantillo explained the work described in the letter is not under laborers' jurisdiction. (TR 612).

Mr. Fred Shamonsky, 911 Air Lift Wing, the contract administration officer for the Air Guard contract testified. (TR 619). It was his duty to administer the contract daily. (TR 656). He described the contract and recognized Mr. Thomas's signature in block 20B. (TR 619-622). He had added the "general wage determination" to the contract and had obtained it from the engineering staff. (TR 622-3, 658, 666). He had not previously heard the term "area practice" but believed the prevailing wage here was the union rate. (TR 670, 691). Although he had been involved with six to ten prior roofing contracts, he was unaware, at the time of contracting, that anyone on a roof must be paid roofers' wages. (TR 670, 691, 727). Although it is the contractor's responsibility to properly pay and classify workers, Mr. Shamonsky testified that if there was a problem with classification of workers, he would want to inform bidders or contractors to ensure workers were properly paid. (TR 671-672, 689, 731). After the Respondent's workers complained, he contacted the DOL and provided the DOL with information and documentation, but never received any "all roofers" policy document from the DOL. (TR 694).

On cross-examination, Mr. Shamonsky testified he was pleased to have the Respondents on the contract as a "small business" and had never heard of an "all-roofers" policy. (TR 711). He said he had checked the Respondents' fourteen references and found he had other government contracts. (TR 729-730).

Mr. Shamonsky explained GX 22 the Pre-performance Conference checklist and GX 23 the Construction Contract booklet he gave the Respondents at the pre-performance conference, July 27, 1993. (TR 624, 626, 703). He testified he went over item 12 of GX 22, concerning the Davis-Bacon Act, with the Respondents. (TR 626, 704). He also discussed Part II of the Construction Contract booklet, dealing with labor standards, with the Respondents at the Pre-Construction Conference. (TR 626). Mr. Shamonsky then explained the prevailing wage had to be paid for specific trades and that if roofers did other work, the Respondent would have to note that on the payroll records. (TR 627). He did not discuss any "roofer's policy" at the time. (TR 627). A document with labor standards clauses was given the Respondent, but the document itself was not part of the actual contract. (GX 24; TR 628-9, 660). On cross-examination, Mr. Shamonsky said when he went over the Davis-Bacon Act portion of the checklist, Mr. Thomas said he would be utilizing laborers and roofers for the job. (TR 704-5). On cross-examination, Mr. Shamonsky was asked to look at RX 5, the FAR extract. (TR 718). He stated FAR 22.404-2a was complied with. (TR 719). He admitted the wage determination contained no prohibition against utilizing "laborers" on the job. (GX 21; TR 725). It was Mr. Shamonsky's impression that there were some tasks on this contract that could have been performed by laborers. (TR 688).

Mr. Shamonsky described the 8/13/93 "Notice to Proceed" letter given Respondents and noted the latter did not start within ten days. (GX 25; TR 629-630). He identified the Respondents' Certified Payrolls (GX 20), observing Mr. Thomas signed the back, indicating the truthfulness of the information. (TR 631). He received those forms during contract performance. On cross-examination, Mr. Shamonsky testified that the Payrolls show the correct rates were paid for the "laborer" and "roofer" classifications.

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[41] I admitted RX 4 over Petitioner's "authentication" objection. (TR 610). Comparing the signature with Mr. Thomas' proven signatures, I find the document authenticated. However, I cannot find it was ever sent or received and note that it is dated post-contract performance.

Mr. Shamonsky observed work under the contract daily; his office was across from the gym. (TR 633, 687). He saw the workers scraping off insulation and applying new roofing. (TR 633). On cross-examination, he related he saw workers ripping insulation and attending the kettle. He took the latter work to be "roofers'" work, but that was up to the contractor. Upon reviewing the Payrolls, he noticed workers listed as "laborers" whom he had seen performing "roofers'" work although he did not know them by name. (TR 633-5). For example, on 12/23/93, there were no "roofers" listed on the Payroll, but he had seen workers doing "roofing" work. (TR 635, 638). The same was true for 4/14/94, 4/21/94 and 4/28/94-6/6/94. (TR 636-637). He testified that on 6/16/94, 6/23/94 and 6/9/94, Mr. Diaz is listed as a "supervisor/roofer," but that Diaz was not the only roofer working. (TR 637). He asked Mr. Diaz why no roofers were listed on the payroll and the latter referred him to the "office." (TR 639). Mr. Shamonsky also discussed the issue with Mr. Bednarz on October 28, 1993, who informed him he would determine the classifications. (GX 20; TR 639, 730). Mr. Bednarz was listed as the "project manager" on the Payrolls. (TR 730). He also telephoned Mr. James Thomas about the issue but the latter never agreed to change any classification. (TR 640). The handwritten notes for 10/28/93 say a "roofer" was present. (GX 20; TR 676). Mr. Shamonsky could not say whether building a chute was roofers' work. (TR 678-9). He opined "clean up" and painting could be either laborers' or roofers' work. He added, "One man did not install this roof." (TR 724).

On cross-examination, Mr. Shamonsky testified concerning entries on the Contractor's Daily Log. (GX 27). On 10/22/93 no roofer was listed. (TR 679). On 10/25/93 two roofers, four laborers, and one supervisor were listed, but the Payroll (GX 20) lists only one roofer. (TR 680). On 11/4/93 the Payroll lists two roofers and seven laborers. (TR 681). On 11/4/93 the Log lists two roofers and four laborers with the tasks of shoveling snow and repairing leak in gym roof. (TR 681-4). On 4/14/94 the Payroll shows six laborers, a project manager, owner and supervisor. (TR 684). On 4/13/94 the Log shows six laborers and one supervisor with the tasks of clean up and a meeting regarding a leak. (TR 684-5).

Mr. Shamonsky explained he performed labor standards interviews once or twice a month. (TR 647-8, 686). He informed Mr. James Thomas and Mr. Bednarz of the results, i.e., misclassification of roofers as laborers. (TR 648). The latter indicated they would take care of it, but back wages were never offered. (TR 649).

On December 21, 1993, Mr. Shamonsky sent the Respondents a letter describing the "misclassification" of workers he had observed performing roofing work and complained to him. (GX 26; TR 641). He also spoke with Mr. Bednarz weekly, in the fall and Spring. (TR 643). Mr. Shamonsky said GX 31 was the Respondent's reply to his letter which he felt was inadequate. (TR 645-6). He informed Mr. Bednarz he had told the workers to contact the DOL. (TR 646). GX 32 was the letter he sent to Ms. Gannister, the Respondents' former counsel, on March 21, 1995. (TR 647).

Mr. Shamonsky testified the contract called for relaying roofs. (TR 649). He saw Respondents' employees doing repairs on the gym roof. (TR 649). While the contract did not require "replastering" or cleaning up splattered tar from buildings, that resulted from water damage from the roof and splattering from the roof job. (TR 649-650, 685). He recalled there might have been some painting to repair leak areas. (TR 651).

Funds in the amount of twenty thousand dollars ($20,239.41) were withheld on the Air Guard contract, according to Mr. Shamonsky. (TR 699).

Department of Labor Testimony

Mr. George Durbin, a Department of Labor Regional Wage Specialist since January 1983, testified on behalf of the government. (TR 735). It is his duty to coordinate all prevailing wage activities for the Delaware/Pennsylvania region and oversee a staff that prepares surveys used for wage determinations. (TR 736). He identified the "general" wage determinations in both contracts at issue herein. (TR 737, 740). He explained the Allegheny County and Delaware "roofers'" rates were based on the rate paid by signatories to collective bargaining agreements. (TR 739-740).

Mr. Durbin explained the difference between a "general" wage determination and a "project" wage determination. (TR 770, 826). Both "general" wage determinations were proper for these contracts. (TR 772-3). Mr. Durbin discussed the dates and coding found on the prevailing wage determinations at length. (TR 783-7, 807-8, 812-813). The wage determinations themselves do not define "area practice." (TR 787-8, 797, 821). On cross-examination, he testified that the DOL examines "area practice" during "enforcement" proceedings; it may not be relevant in determining the prevailing wage rate, however. (TR 798). He admitted DOL does not establish standard job descriptions for wage determinations because duties may vary from region to region. (TR 801).

Mr. Durbin testified that it is a contractor's responsibility to comply with the Davis-Bacon Act and to do so it needs information about wage rates, whether it's collective bargaining or an average of all rates. (TR 740). This requires an understanding of the workers. (TR 741). The contracting agencies have no responsibility of informing contractors of union practices or the basis of wage determinations. (TR 741-2). The DOL provides guidance concerning such matters. On cross-examination, he said there is always an "area practice" for each trade determined by the market place. (TR 788). He added the "all-roofers" classification issue had been raised country-wide and he suspected, when the Air Guard contract was issued, that it applied in Pittsburgh but had not researched it at that time. (TR 792). He admitted having had contact with the Philadelphia Roofers Union and Local 30 Roofers' Union regarding the Wilmington, DE, contract. (TR 793, 795, 817). He did not know if the DOL informed either agency of the "area practice" before the investigations into the present case. (TR 796, 819). But both agencies were notified of it at some point. (TR 819). He said roofers are an "unassisted" trade. (TR 814). The DOL generally does not and has no burden of advising contractors concerning area practices. (TR 815-6, 820). It would be infeasible for the DOL to do so. (TR 816-817, 820).

Mr. Durbin identified GX 34, a letter from Mr. Sykes (DOL) to Ms. Gannister, which he had prepared and signed for Mr. Sykes. (TR 743). He testified about an early May 1992 meeting between the Respondents and DOL officials concerning several open Davis-Bacon Act cases and the wage rates in Philadelphia and New York. (TR 744, 803). The meeting had come about because Mr. Thomas had contacted headquarters about continuing investigations involving him. (TR 744). Mr. Durbin's office was asked to resolve Mr. Thomas' concerns. (TR 744). Both classification and procedures for challenging classifications were discussed. (TR 745). The *Fry Brothers* case tenant, that contractors must follow union practice if the wage determination is based on it, was discussed. (TR 745). Contacting unions and signatory construction firms were discussed as methods to ascertain area practice. (TR 747).

At a subsequent meeting, in late June 1992, Mr. Thomas articulated his position that since he was a non-union contractor he need not follow union practice. (TR 748-9, 801, 804, 822). Mr. Thomas further complained his contract indicated both "roofer" and "laborer" classifications. (TR 802). Mr. Durbin explained to him that was not applicable and how to properly determine

classification. (TR 748, 822). Investigations concerning "misclassification" of workers on several of the Respondents' roofing contracts was discussed. (TR 749-750). At the time, Mr. Durbin reiterated that employees on the Respondents' Lakehurst, Willow Grove and Wilmington, DE, contracts should be classified as "roofers." (TR 751, 795). Again, Mr. Durbin clarified that union practice was to be followed to properly classify employees. (TR 751). However, the Respondents never asked what the Pittsburgh "area practice" was. (TR 821). He added that the Naval Contract here was not for the demolition of a roof, which would permit the use of "laborers." (TR 754).

Mr. Durbin explained he had calculated the back wages owed in GX 35 (Air Guard) and GX 36 (Naval Reserve). (TR 757, 763-4, 804). He took the hours and wages from the payrolls and calculated the difference. (TR 758). His figures were higher than the Order of Reference because the DOL had amended the amount in October 1997. He explained how he revised the Navy calculations regarding two workers, Mrs. Sinkiewicz and Porvasnick, based on JX 2 and disagreed with the Respondents' position concerning Mrs. Lobue, Scarpulla, and Porvasnick for the week ending June 20th. (GX 37; TR 764-769)(See Stipulated Facts, *supra*). He verified that Appendices "A" and "B" JX 1 correctly identify the rate of pay and hours worked for each listed employee. (TR 770). On cross-examination, Mr. Durbin pointed out that employees, such as Mrs. Thomas, Bednarz, Diaz, and those paid at rates above "roofers'" rates were not included on the GX 35-37 spreadsheets. (TR 805-6).

*Naval Reserve Contract*

According to Mr. Durbin, DE 91-2 with two modifications is the Davis-Bacon Act wage determination for Delaware "Building and Heavy." The classification for "roofers" is on page 3 and calls for an hourly wage of $21.97 plus $6.57 in fringe benefits. It too is based upon collective bargaining rates. On cross-examination, Mr. Durbin admitted the wage determination has no "alpha codes" to determine which wages are based on collective bargaining rates and which are not. The wage determination has classifications for "pot tenders" and "roofers." The code "LAB00613C" itself on the wage determination does not indicate it is based on collective bargaining agreements. The 6/1/92 date is the date of the collective bargaining agreement from which the wage was derived.

*Air Guard Contract*

Mr. Durbin identified the general wage determination in GX and said its purpose was to set the minimum wages and fringe benefits on construction contracts, but not for contractors to use in preparing contract bids. Wage determination PA30001 has a "roofer" classification, on page 13, calling for an hourly wage of $18.39 plus $5.05 in fringe benefits. That wage determination is based on wages paid to roofers under collective bargaining agreements, such as the one for Local 37. The code "ROOF0037C" stands for "roofers" and the Local (union). The union rates are based upon the majority of responses to surveys.

Wage Determination Criteria & Procedure[42]

The Respondents once again seek to attack the validity of the underlying wage

[42] On November 10, 1997, I ruled that the validity of the underlying U.S. Department of Labor prevailing wage determinations related to the contracts herein were not matters in issue in this proceeding.

determinations in their Proposed Findings of Fact and Conclusions of Law.[43] I previously ruled that the Respondents' attack on the underlying prevailing wage determinations were not proper in this proceeding.

The Davis-Bacon Act was enacted to ensure workers on federal construction projects would be paid the wages prevailing in the area of construction.[44] Under the Act, the Secretary of Labor sets "prevailing" minimum wage rates which contractors must pay employees on any construction project over $2,000 to which the United States is a party, or under any one of more than fifty other statutes involving federally-funded contracts.

Part 1, 29 C.F.R. Subtitle A, sets forth the procedure for making and applying determinations of prevailing wage rates and fringe benefits for both "project" wage determinations and "general" wage determinations for contracts in specified localities.[45] 29 C.F.R. § 1.1. The Administrator obtains wage rate information from a variety of sources, including voluntary submissions from contractors, labor organizations, federal agencies, public officials, state and local officials. 29 C.F.R. § 1.3(a). He may consider: statements showing wage rates paid on projects; signed collective bargaining agreements; state and local wage rate determinations; data submitted by contracting agencies; and, other pertinent information, which he may supplement from any sources. 29 C.F.R. §§ 1.3(b) & (c). The wage determinations in the present case are "general" wage determinations.

If the contracting parties and workers agree on a classification and wage rate, a report is sent to the Administrator who approves it or any modification. 29 C.F.R. § 5.5(a)(1)(ii)(B). In the event a contractor or laborer to be employed in a classification, or their representatives, and the contracting officer do not agree on the proposed classification and wage rate, the contracting officer must forward questions, views and recommendations to the Administrator who must issue a determination within thirty days. 29 C.F.R. § 5.5(a)(1)(ii)(C). Any interested person may seek reconsideration of a wage determination first before the Administrator and, if dissatisfied, appeal the subsequent decision to the Administrative Review Board.[46] 29 C.F.R. §§ 1.8 & 1.9. Requests to review wage determinations must be "timely made." 29 C.F.R. 7.4(a).[47] The Administrative Review Board renders the agency's "final decision." 29 C.F.R. § 7.1(d).

The Federal Acquisition Regulations (FAR), found in 41 C.F.R. Part 22, require all pertinent contracts contain a clause that the Department of Labor prevailing wage determination be placed in each solicitation and the award of the contract "shall be conditioned upon acceptance of the wage determination." 41 C.F.R. § 105.72.80. The FAR also requires a clause informing

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[43] Proposed Findings of Fact and Conclusions of Law, page 12, section B, I.

[44] *Building and Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 613 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984) *cited in Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110 (D.C. Cir. 1996).

[45] The "prevailing wage" is the wage paid to the majority of the laborers or mechanics in the classification on similar projects in the area during the period in question. 29 C.F.R. § 1.2(a)(1). "Area" means "the city, town, village, county or other civil subdivision of the State in which the work is to be performed." 29 C.F.R. § 1.2(b). See 29 C.F.R. § 1.5(b) for the definition of a "general" wage determination.

[46] "Interested person" is very broadly defined and includes agencies, contractors, laborers, labor associations, etc. 29 C.F.R. §§ 7.2(b)(1) & (2).

[47] "Timeliness" is dependent upon the pertinent facts and circumstances involved, including the contract schedule of the administering agency, the nature of the work involved, and its location. 20 C.F.R. § 7.4(a). Here contract N62472-90-C-0410 allegedly covered July 30, 1991 to August 10, 1992 and contract No. F36629-93-C-007 allegedly covered July 12, 1993 to July 14, 1994.

the relevant actors of procedures to challenge wage determinations, as set forth in 29 C.F.R., Parts 1, 5 and 7. 48 C.F.R.§§ 22.404-11 and 52.222-6.

In this case, the Administrator alleges he examined local area practice in New Castle County, Delaware, and the area practice of union contractors, including collective bargaining rates for various classifications, in Pittsburgh, Pennsylvania, in assessing the Respondents' compliance with the appropriate wage determinations included in the relevant contracts.[48] The Petitioner's pleadings raise the issue, "Is the prevailing union practice in the area where the contracts were awarded to pay workers who performed clean-up and maintenance work on roofs according to 'roofers' rates?" The Respondents argue the "prevailing union practice" in the area is irrelevant to this matter and the controlling practice is the area practice.[49] The Respondents' argument is incorrect. In this case, the "area practices" are, in fact, the prevailing union practices.

An elaborate procedure, described above, has been established under both the Department's regulations and the FAR, to ensure challenges to wage determinations and classifications are made and resolved very early in the contracting process. In this case, it does not appear that the Respondents challenged the Petitioner's wage determination until enforcement action was initiated well after contract performance was completed.[50] This delay, in and of itself, would make any challenge to the method of conducting, the criteria used, and accuracy of the wage determination untimely. 29 C.F.R. 7.4(a); see, *Vulcan v. Arbor Hill Corp., supra* 81 F.3d at 1119 and *ICA Construction Corp. v. Reich,* 55 F.3d 636 (11th Cir. 1995).

Secondly, it appears jurisdiction of the subject matter of the challenge to the validity of the underlying prevailing wage determinations is lacking. The regulations, discussed above, establish a very specific procedure for challenges to wage determinations. Nowhere do they provide for challenges to wage determinations to be raised before an administrative law judge in a proceeding such as this. The instant proceeding concerns proposed debarment and resolution of a dispute concerning payment of prevailing wage rates or proper classification, not the validity of the underlying wage determinations themselves. Sections 5.11 and 5.12 make no provision for such a challenge at this stage. In fact, the regulations, including the FAR, very specifically provide that challenges to wage determinations be made to the Administrator with subsequent appeals to the Administrative Review Board. See also *Prime Roofing*, WAB Case No. 92-15 (1993)(contractors are not permitted to present evidence challenging the correctness of the underlying wage determination after contract award) and *Trataros Construction*, WAB Case No. 92-03 (1993).[51]

The Wage Appeals Board has previously explained, "[m]anifest injustice to bidders would result if the successful bidder on a project could challenge his contract's wage determination rates

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[48] Wage & Hour Division's "charging letter," of August 9, 1995.

[49] The Petitioner, in its Opposition to Motion to Compel, clarifies the distinction between an "area wage survey" and an "area practice survey." (p. 4-6). An "area wage survey" is used to develop the underlying prevailing wage determination. The "area practice survey" is used by the Secretary to determine how the signatories to a collective bargaining agreement classify workers and then only when an investigation discloses a contractor has incorrectly classified a worker on a particular contract. It is information concerning the "area wage survey" and underlying prevailing wage determination which is irrelevant to this proceeding.

[50] The Respondents argued that they had no reason to challenge a facially valid prevailing wage determination before this enforcement proceeding. However, precedent establishes that very obligation to inquire prior to contracting. See, *Tele-Sentry Security v. Secretary*, 119 Lab. Cas. (CCH) 35, 534 (D.D.C. 1991) and *Vulcan, supra.*

[51] Respondents state, in their motion, ". . . Respondents challenge the ex post facto application of a wage rate, arguably proper for its stated category, to the wrong category of labor." (Motion to Compel Discovery, page 18).

after all other competitors were excluded from competition." *Dairy Development v. Pierce*, Civ-86-1353-R (W.D. Okla.) slip opin. at 19. Ensuring certainty in the procurement processes of government and the protection of wage standards for employees by providing a wage floor of which all bidders are aware are equally important considerations warranting timely challenge to wage determinations. *See Universities Research Association v. Coutu*, 450 U.S. 754, 776 (1981) *cited in The Matter of Joe E. Woods, Inc.*, Administrative Review Board (ARB) No. 96-127 (ARB Nov. 19, 1996).

As the ARB said, in *Woods, supra*, "[T]here is an attendant obligation on the part of would-be contractors to familiarize themselves with the governing wage determination and to take advantage of the challenge procedure should the wage determination be deficient. *Sumlin & Sons*, WAB Case No. 95-08 (Nov. 30, 1995)." In the instant case, the evidence does not show that the Respondents made any such efforts at the appropriate time.

Burden of Proof

In an administrative proceeding, the proponent of the Order of Reference, which in this case is the DOL, bears the burden of going forward with the evidence. The required standard of proof is a showing by a preponderance of the evidence. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. 1980) cert. denied, 449 U.S. 834 (1980); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984).

Labor Standards Provisions

The contracts, in the present case, awarded by agencies of the United States government, both provided for construction activity, i.e., re-roofing, at federal facilities and are subject to the labor standards provisions of the Davis-Bacon Act and its implementing regulations. 40 U.S.C. § 276a and 29 C.F.R. § 5.1. The Act requires contracts subject to it contain wage determinations issued by the Department of Labor, pursuant to 29 C.F.R. Part 1, which are based upon the prevailing wages for the area of issuance. Laborers and mechanics who work on the sites are to be paid in accordance with the wage determinations. 40 U.S.C. § 276(a).

The regulations providing the labor standards provisions applicable to Davis-Bacon and Related Acts contracts are very specific as to the wages to be paid employees. (29 C.F.R. § 5.5). All laborers and mechanics working upon the site are to be compensated at rates not less than those contained in the wage determination of the Secretary of Labor. (Section 5.5(a)(1)). The regulations contain pay provisions for workers performing labor in more than one classification. Likewise, they also contain provisions applicable to any class of laborers which is not listed in the wage determination and in which a classification is necessary in order to conform with the wage determination. Additional classifications can be obtained. (Section 5.5(a)(1)(ii)(A)). If the application procedures for obtaining new classifications are unsuccessful, then the regulations also provide for the referral of questions to the Administrator for issuance of a determination. (Section 5.5(a)(1)(ii)(C)).

The DOL argues here that the area practice, in the area of both contracts, is that any person performing work on a roof, under a contract to remove and replace the roof, versus complete "demolition" of a roof, must be classified as a "roofer" and paid the prevailing wage rate, here based upon Union rates. The DOL further argues that the Respondents were repeatedly informed how to handle Davis-Bacon Act matters and disregarded their obligation to their employees.

The Respondents argue that the government's advice was ambiguous and the Respondents had no intent or disregard warranting debarment. Further, although collective bargaining agreements may have formed the basis of the wage determination and area practices, the contracting public was unaware of them. Specifically, the Respondents say they were not aware of them until completion of the contracts. Finally, they argue, even if the area practice applies, there is evidence a "split" of wages between "laborers" and "roofers" is acceptable to the DOL, which should likewise be accepted by this forum.

Employees are to be classified and paid according to the work they perform, without regard to the level of skill required. 29 C.F.R. § 5.5(a)(1); *Fry Brothers Corporation*, WAB Case No. 76-06 (June 14, 1977). In order to comply with the Davis-Bacon Act provisions of a contract, workers must be classified according to the classifications used in the locality in which the contract is performed. *Emerald Maintenance, Inc. v. U.S.*, 925 F.2d 1425, 1427 (Fed. Cir. 1991) *citing Building & Construction Trades's Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 614 (D.C. Cir. 1983) and *Johnson-Massman, Inc.*, 96-ARB-118 (Administrative Review Board 1996).

Where the applicable wage determination reflects collectively bargained wage rates, as in the present case, the classifications of work used by contractors who are signatory to collective bargaining agreements are to be followed under the wage determination. *Fry Brothers, supra*; *More Drywall, Inc.*, WAB Case No. 90-20 (April 29, 1991); *Trataros Construction Corp.*, WAB Case No. 92-03 (April 28, 1993); see also *Prime Roofing*, WAB Case No. 92-15 (1993). The compensation practices of employers who are not signatories to the collective bargaining agreement make no difference to proper classification on a Davis-Bacon project. *Fry Brothers, supra*.

As the Petitioner points out, in a previous case on this precise issue, the Wage Appeals Board held that ". . . statements by the roofers and the laborers . . . indicated an agreement that . . . roofer(s) perform all tasks in connection with tearing down roofs in a situation where the roof in question is being replaced." *Alpine Roofing*, WAB Case No.78-22 (1979). That is the case here with the unions in the area of both contracts.

Paraphrasing the Court's language in *Emerald Maintenance*, *supra*, at 1429, however Thomas & Sons chooses to style its position, whether as a defective or ambiguous specification or a misrepresentation, the essence of the matter relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contracts is surely one of the labor standards provisions. The dispute thus arises out of the labor standards provisions of the contracts and the Dispute provisions require that it be resolved by the DOL.[52] I do not find the Respondents' criticism of the *Emerald Maintenance* holding persuasive.

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[52] The *Emerald Maintenance* Court relied, in large part, on the "differing site conditions clause" to find the contractor's obligation to follow the DOL wage determination, ascertain the local area practices for appropriately classifying and paying its employees, and for assuming the risk of loss for failing to do so. That clause, found in the present contracts, as well, states:

> [t]he contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost . . . [a]ny failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

The Respondents admitted certain of the named employees performed "clean-up,"other maintenance work, and "non-laborers'" work on the roofs on both contracts and were paid "laborers'" wages. As discussed below, however, that work is in fact "roofers'" work according to area practices.

The Petitioner has conclusively established that the work performed by the Respondents' employees and those of his subcontractors, under both contracts, in removing and replacing the roofing systems, was exactly the type of work performed by "roofers" in both areas. Every former employee who testified performed "roofing" work and should have been classified as a "roofer" for that work. Most of them observed other employees doing "roofing" work when the documentation reflects the latter were classified as "laborers."

The evidence establishes an "area practice" by the signatories to collective bargaining agreements that the work performed by the Respondents' employees required a classification of those employees as "roofers," not "laborers" and that although the Respondents should have paid the named employees "roofers'" wages, under the prevailing wage determinations, Respondents did not do so. I also specifically find that the testimony of the agency and union officials and union documents establish that the "clean-up," "leak repairs," and other repairs necessitated as a consequence of the roof replacement work was the type of work to be performed by "roofers" under the area practices applicable to both contracts.

It is particularly troublesome that the Respondents hired experienced "roofers," such as Messrs. Labouseur, Lobue, and Sinkiewicz on the Naval Reserve contract and Messrs. Hutton, Kirley, and Kurtz on the Air Guard contract, and then classified and paid them "laborers'" wages for "roofers'" work. The evidence summarized above shows there were many days when roofers' work was performed under both the Naval Reserve and Air Guard contracts when not one employee was classified by the Respondents as a "roofer". The discrepancies between the handwritten contractor Daily Reports and the typed versions, which always showed fewer roofers than the handwritten versions, is equally troubling. This does not detract from the inappropriateness of misclassifying and under-paying all the named employees. Even more egregious is the corroborated testimony that Respondents' on-site supervisor, Mr. Diaz, successfully threatened employees with loss of their jobs should they tell the truth about the nature of their work.

Although the evidence and the Respondents' arguments provide clues as to their motivations, their actions remain problematic.[53] However, there can be no doubt that the Respondents made a deliberate and informed choice in misclassifying its workers after being repeatedly informed of the area practices requiring that all employees performing work of a nature performed by the named employees, under these contracts, be classified as "roofers'" work. Although it is unnecessary, and I do not rely on the DOL's multiple investigations into the Respondents' misclassifications on other government contracts, the unobjected evidence in the present record concerning those investigations, belies the Respondents' claims of ignorance concerning the possible existence of an "all-roofers" area practice and its responsibility to ascertain such practices. The evidence concerning those other investigations does reveal that the Respondents are not novices to government contracting.

Mr. Durbin's testimony shows that the DOL made an extraordinary effort to resolve

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[53] Typically, the lowest bidder is awarded government contracts. If one can reduce one's bid based upon an assumption that one can pay workers less than the prevailing Davis-Bacon wage rate, one might have the winning low bid. Of course, this is exactly the behavior Davis-Bacon proscribes.

employee classification problems. The DOL met with the Respondents twice, in early May 1992 and in late June 1992 to resolve misclassification issues. Mr. Durbin attempted to disabuse Mr. Thomas of the notion that since he was a non-union contractor he need not follow a union area practice. Mr. Thomas was informed how to determine area practices and the procedures for challenging prevailing wage issues.

The testimony of the contracting agency officials and the Department of Labor witness together with the documentary evidence and unambiguous language of both contracts, which include straight-forward FAR provisions relating to Davis-Bacon Act requirements, leave no doubt that the Respondents were properly informed of their Davis-Bacon Act responsibilities.[54]

The jurisdictional pamphlets and manuals, concerning safety and training, prepared by the United Union of Roofers, Waterproofers & Allied Workers reflect and corroborate the area practices of classifying the overwhelming majority of the work performed in re-roofing projects as "roofers'" work.

The first documentary evidence of a series of letters concerning the misclassification issue on the Naval Reserve contract was Mr. Hutchinson's letter of June 3, 1992 to the Respondents. However, Mr. Mack testified that he and Mr. Hutchinson, his superior, met with the Respondents around October 21, 1991 and informed the latter that anyone working on the roof would be classified as a "roofer." Mr. Hutchinson further testified that he had informed the Respondents of the area practice, which he had learned of in 1989-1990, when he conducted the pre-construction conference before actual work was to begin in August 1991. He also provided the Respondents with a Pre-Construction Conference Guide. Item 17a, of the Guide, informs contractors to "[C]lassify all workers in accordance with wage decisions included in the contract document . . ." (GX 3). Mr. Hutchinson corroborated Mr. Mack's recollection of the October 21, 1991 meeting.

On the Air Guard contract, the classification matter was specifically raised by Mr. Shamonsky's December 21, 1993, letter to the Respondents. (GX 31). Unlike the Naval Reserve contract personnel, Mr. Shamonsky was not aware of the "all-roofers" area practice at the time of the pre-construction conference with the Respondents. He did generally reiterate the Respondents' Davis-Bacon Act responsibilities at the conference. Mr. James Thomas informed

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[54] For example, paragraph 16a of the "Preconstruction Conference Guide," (Naval Reserve Contract), sets forth the contractor's responsibility to: "(1) pay minimum wages; (2) Post contracting wage determination"; and, (3) under "Payrolls," to "classify all workers in accordance with wage decisions included in contract document . . ." (GX 3, page 7-8). The full text of the Labor-related FAR provisions were provided to the Respondents at a pre-Construction Conference. (GX 22 & 24; Testimony of Mr. Shamonsky). FAR 52.222-13, in each contract, states: "All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5 are hereby incorporated by reference in this contract." In August 1991, at the pre-construction conference, Mr. Hutchinson made the area practice clear to the Respondents, that is, in this contract, all workers on the roof were to be classified as "roofers." (TR 220, 261). On June 3, 1992, Carl Hutchinson informed the Respondents "[A]ll employees connected with the removal of old and the application of new roofing systems shall be classified as roofers." (GX 6). Mr. Shamonsky testified he went over a Pre-performance Conference checklist with the Respondents and provided them with a document entitled "Information on Construction Contracts" which contained explicit information concerning labor standards in Part II. (GX 22 & 23). Part II of the checklist reflects Mr. Shamonsky discussed labor standards, including the correct classification of workers, with the Respondents. On December 21, 1993, about mid-way through the contract performance, the contracting officer wrote to the Respondents advising them that the DOL had informed him several subcontractor employees had complained about: "Mis-classifying employees as laborers . . . performing roofing work, however not classified as roofers nor did they receive that rate." Mr. Mack and Mr. Hutchinson met with the Respondents around October 21, 1991. (TR 78). At the meeting, Mr. Hutchinson discussed Davis-Bacon Act compliance and said anyone working on the roof would be classified as a "roofer." During the course of contract performance, Mr. Shamonsky spoke with Mr. Thomas, Mr. Diaz, and Mr. Bednarz about the apparent misclassification (TR 639, 640, 730). Mr. Durbin specifically informed the Respondents how to determine "area practice" at two meetings in May and June of 1992.

him, at that time, that he would be using laborers and roofers for the job. However, Mr. Shamonsky raised the misclassification issue with the Respondents' project manager, Mr. Bednarz, on-site supervisor, Mr. Diaz, and Mr. James Thomas himself as early as October 1993, after observing that the certified payrolls listed employees he had seen performing "roofing" work as "laborers."

Evidence submitted by the Respondents tending to support their purported belated effort to ascertain the Allegheny County, Pennsylvania, area practice, namely the August 24, 1994 letter to Laborers' Local Union 373, in Pittsburgh, Pennsylvania, and the incomplete "Project Agreement" allegedly sent in response, is simply not credible.[55] All the dates (August 1994) on the documents are either after completion of the Air Guard contract or immediately prior to its completion, well-after the aggrieved employees had departed.

The Respondents' purported reliance on the contracting officers' advice as to the appropriate wage rate cannot relieve him of the responsibility to pay the correct wage rate to its employees. As the Wage Appeals Board stated, there are two reasons this is so. First, a contracting officer's advice is not binding on the DOL and does not estop the DOL from requiring the payment of the proper wage rate. The DOL has the final authority in this regard under the Davis-Bacon Act and Reorganization Plan No. 14, and no one outside the DOL operates with any apparent authority such as would estop the DOL from making the final determination. Secondly, an estoppel argument would not be binding on the employees themselves so as to cut off any individual rights the may have under the Davis-Bacon Act to receive the proper wage rate. *Metropolitan Rehabilitation Corp. Bronx, NY*, WAB Case No. 78-25 (August 2, 1979), slip opinion at 15.

Even if the contracting agencies had acquiesced to the contractor's proposed classification and payment of a lower wage rate, which the record shows they did not, it would not relieve the Respondents from their responsibility of paying the correct rate. *Sentinel Electric Co.*, WAB Case No. 82-9 (April 5, 1984). "The Davis-Bacon Act was intended to protect the rights of the laborers and mechanics employed on the projects, not to protect the contractors from bad advice given by someone without the final authority to make the determination. *U.S. v. Binghampton Construction Co.*, 347 U.S. 171 (1954)." *Metropolitan Rehabilitation Corp. Bronx, NY, supra*.

It was incumbent upon the contractor to be certain that its employees were properly classified when performing a Davis-Bacon Act job. By misclassifying and underpaying workers, Respondents proceeded at their own peril. *The Matter of Tele-Sentry Security*, W.A.B. Case No. 87-43 (June 7, 1989).

Respondent Arguments

The Respondents argue that prior to entering these contracts, in 1991 and 1993, the "general contracting public" and they were not aware of a Department of Labor policy that employees performing roofing work, in projects other than complete demolition, were to be classified solely as "roofers."[56] They argue that this was information solely within the knowledge of the contracting agencies. Citing *U.S. Ex Rel. Windsor v. Dyncorp, Inc.*, 895 F.Supp. 844,

[55] While I have accepted the fact the one signature on RX 4 is Mr. Thomas', there is no evidence that the purported signature of Mr. Flaherty is genuine.

[56] Such an argument with respect to the Air Guard contract which followed the Naval Reserve contract is completely disingenuous.

849 (E.D. Va. 1995) and *Griffen v. Reich*, 956 F.Supp. 98, 101 (D.R.I. 1997), they argue it was the agencies' duty, under 29 C.F.R. § 1.6(b), not their's to insure appropriate, accurate and unambiguous wage determinations were included in the bid solicitations and to ascertain the appropriate classifications applicable to the contracts.[57] The Respondents propose, as a finding of fact, that in reasonable reliance on its contracts, the Respondents made reasonable classification determinations.

However, the agencies here complied with the 29 C.F.R. § 5.5 mandate reiterated by the *Dyncorp* court, that is, to "determine the appropriate minimum wage for each of the various classes of mechanics and laborers predicted to be needed for the contract." (Emphasis added). The court, in *Griffen* relied on the language of 29 C.F.R. § 5.6, to find the contracting agency had an "initial responsibility to ensure compliance with prevailing wage rules."[58] The facts, set forth above, establish without any doubt that both agencies here included the proper Davis-Bacon Act clauses in their solicitations and contracts with the Respondents as well as valid wage determinations containing classifications for "roofers" and "laborers." When it came to their attention that employees were not being properly classified the agencies took action to ensure compliance as required.

Contrary to the Respondents' arguments, the Federal Acquisition Regulations (FAR) provisions, incorporated in both contracts herein, unambiguously place the burden squarely on their shoulders to properly classify, pay, and certify the correct classification and payment of its employees. FAR 52.222-6 and FAR 52.222-8. Labor regulations are also unambiguous concerning this matter. 29 C.F.R. §§ 5.5(a)(1) 5.5(a)(3)(ii)(B)(3) and 5.6(a)(1).[59]

The Davis-Bacon regulatory scheme requires contracting agencies to include within their building contracts a Department of Labor wage determination covering the appropriate minimum wage for each of the various classes of mechanics and laborers predicted to be needed for the contract. This procedure serves to assist contractors to comply with the Davis-Bacon Act. Contracting agencies typically do not have expertise in the type of work sought under contracts, but rather must rely on contractor's expertise for job performance, hiring and classifying employees, and properly paying employees. It is not unreasonable for a contracting agency to

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[57] 29 C.F.R. § 1.6(b) states:

> Contracting agencies are responsible for insuring that only the appropriate wage determination(s) are incorporated into bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply. Any question regarding application of wage rate schedules shall be referred to the Administrator, who shall give foremost consideration to area practice in resolving the question.

[58] 29 C.F.R. § 5.6, states, in pertinent part:

> No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses [relating to Davis-Bacon requirements] and the appropriate wage determination of the Secretary of Labor are contained in such contracts . . . The Federal agency shall cause such investigations to be made as are necessary to assure compliance with the labor standards clauses required . . .

[59] 29 C.F.R. §§ 5.5(a)(3)(ii)(B)(3) requires contractors to certify, with each payroll:

> That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

rely on a roofing contractor to adhere to labor laws and to know, based on area practice, which of his employees must be classified as a laborer, sheet metal worker, painter, or roofer.[60] Such reliance does not shift any statutory duty as alleged by the Respondents.

The Department of Labor clearly retains the duty to determine the appropriate wages for particular classes of employees in various geographic areas and, when a dispute arises, to ascertain if employers have properly classified and paid employees based upon local area practices. As previously mentioned, if there is any disagreement concerning wage standards, an elaborate procedure is available to facilitate resolution of the matter. The Respondents' attempt to shift his regulatory and contractual duties to the government and to present that dereliction of duty as a defense is frivolous. *In The Matter OF Thomas J. Clements, Inc.*, WAB Case No. 84-12 (June 14, 1984), 1984 WL 161753 (W.A.B.), excerpt from page 1984 WL 161753, *4 (W.A.B.). It was the Respondents' obligation to properly classify its employees and pay them the appropriate wages. *See Emerald Maintenance, Inc. v. United States,* 925 F.2d 1425 (Fed. Cir. 1991).

In their brief, the Respondents misconstrue the government's position. The Respondents interpret the government position as one requiring that all employees working under a roofing contract be paid as "roofers."[61] That is simply not the case. The wage determinations for both contracts also contained classifications for other types of work, i.e., sheet metal workers, painters, truck drivers, etc. No one has suggested that employees properly classified as sheet metal workers should have been classified as "roofers." In fact, for the Air Guard contract, the Respondents utilized, properly classified, and properly paid several employees as "sheet metal" workers, painters, masons and carpenters on these projects. (See GX 5). In the Naval Reserve contract, there is no allegation that employee Joseph Gulotta, who had been variously classified as a painter, sheet metal worker, carpenter, and laborer, had been misclassified. Additionally, there were infrequent times when the Respondents properly classified employees performing "roofers" work, such as Mr. Vannote, under the Naval Reserve contract, as "roofers." The government's consistent and unambiguous position has been that employees performing "roofer's" work, as defined by the area practices, must be classified as "roofers" and not otherwise.

Back Wages Due

It is well-settled that the Secretary of Labor may obtain back wages for non-testifying employees where the record and testimony of testifying witnesses establishes they are entitled to compensation. *See, In The Matter of Structural Services*, WAB Case No. 82-13 (June 22, 1983). *See also, Matter of Schnabel Associates, Inc.*, WAB Case No. 89-18 (June 28, 1991); and, *M.G. Allen and Associates*, 29 WH Cases (BNA) 374 (1988) *citing both Structural Services and Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946). Likewise, it is permissible to award back pay to non-testifying employees based on the representative testimony of a small number of employees. *RC Foss*, WAB No. 87-46 (1990). Back wages have been

[60] As a further illustration, if a contractor used child labor, the contracting agency would rely on the contractor to adhere to child labor laws and regulations. If the contractor did not follow the law, then the agency would report any alleged violation to the Department of Labor. In such a case, it would be ludicrous for a contractor to seek exculpation because the agency did not specifically tell him to conform to laws he was obliged to follow. Agencies must necessarily rely on their contractors to follow a myriad of laws, e.g., OSHA, EEOC, etc., and the Davis-Bacon Act

[61] See, for example, pages 24, 31, 33, and, 34 of Respondent's Proposed Findings of Fact and Conclusions of Law.

awarded where no employee testified. *B & B Contractors*, WAB No. 89-04 (1991).

The testimony of Mr. Durbin, the DOL wage specialist, concerning his calculations of back wages due and the enumeration of those calculations on GX 35, 36 and 37, was based on the Respondents' certified payroll submissions and are readily verifiable. I find those calculations and summaries reliable, correct and appropriate and adopt them except as otherwise noted. (Appendix A). Messrs. Siemanawicz and Labouseur were, on occasion, classified as "kettlemen." The wage determination pertaining to the Naval Reserve contract contained a "laborer" classification, "class 2," for "pot tenders," as kettlemen are sometimes known. When classified as kettlemen, they were paid $24.50 per hour. The facts do not establish this was a misclassification with respect to Messrs. Siemanawicz and Labouseur. Thus, I find Mr. Siemanawicz is owed only $289.75 for 30 1/2 hours, at a difference in wages of $9.50 per hour, for the weeks ending 5/16/92 and 5/30/92 when he was misclassified as a "laborer". I find Mr. Labouseur is owed only $598.52 for 63 hours, at a difference in wages of $9.50 per hour, for the weeks ending 5/16/92, 5/23/92 and 5/30/92 when he was misclassified as a "laborer".

Seven employees, under the Naval Reserve contract, were paid $19.00 per hour as "laborers" and $24.50 per hour when the prevailing wage determination required payment of $28.50 per hour as "roofers." Twenty-eight employees, under the Air Guard contract were paid $18.11 per hour as "laborers" when the wage determination required payment of $23.44 per hour as "roofers." Since the Respondents did not keep accurate accounts of the hours each employee worked in each classification they must be paid according to the roofers' classification, regardless of whether some of their time on the projects were spent performing tasks which fell into different classifications with lower corresponding wage rates. *In Re Trataros*, 28 Wage/Hour Cases (BNA) 865, 872 (ALJ Decision 1987), *aff'd* WAB (1992).

I find the Respondents owe $5643.88 in back wages on the Naval Reserve contract and $27,079.07 on the Air Guard contract ($4,266.67 of which is due to subcontractor Bill Jackson Roofing employees) all as set forth in detail in Appendix A.

Debarment

In the instant case, the Respondents' work on both contracts implicates the Davis-Bacon Act, not one of the "Related Acts." "The debarment provisions of the Davis-Bacon and Related Acts are not to be viewed as punitive measures to be imposed after a violation is discovered but as a preventive tool to discourage violation." *Brite Maintenance Corp.*, WAB Case No. 87-7 (May 12, 1989).[62] Its purpose is to enlist the cooperation of Davis-Bacon employers in self-enforcing compliance with the Act's requirements. *Brite, supra.*

Section 3(a) of the Davis-Bacon Act provides in pertinent part:

> . . .The Comptroller General of the United States is . . . authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed . . .

[62] Debarment can be a serious blow to firms specializing in government business but it may be the only realistic way to deter contractors from willfully violating the law, based on a cold weighing of costs and benefits. *Janik Paving & Construction., Inc. v. Brock*, 828 F.2d 84, 90-91 (2d Cir. 1987). I note "willfulness" is not at issue here.

40 U.S.C. § 276a-2(a). This statutory provision is implemented at 29 C.F.R. § 5.12(a)(2).

Thus, the Davis-Bacon Act requires that a firm that has "disregarded its obligations" to its employees shall be debarred for three years. The Board, in *G & O General Contractors, Inc.*, WAB Case No. 90-35 (Feb. 19, 1991) interpreted the Act as containing no language giving the Department of Labor or the Comptroller General discretion to impose a lesser period following the determination that a violation has occurred. Id. at 2, 3. The Board stated further that evidence regarding "mitigating factors" or "extraordinary circumstances" is irrelevant to the issue of debarment.

Violations of the Davis-Bacon Act do not *per se* constitute a "disregard of an employer's obligations" within the meaning of Section 5.12(a)(2). *See Framlau Corp.,* WAB Case No. 70-05 (April 19, 1971) slip opinion at 4-5; and *Structural Concepts, Inc.*, WAB Case No. 95-02 (Nov. 30, 1995), slip opinion at 3-4. To support a debarment order, the evidence must establish a level of culpability beyond mere negligence. *Id.; P&N, Inc., Thermodyn Mechanical Contractors, Inc. and Gamboa,* ARB Case No. 96-116 (formerly WAB Case No. 95-13), 94-DBA-72 (Oct. 25, 1996); *see, e.g., P. J. Stella Construction Corp.*, WAB Case No. 80-13 (Mar. 1, 1984), slip opinion at 5-6 (employer found "grossly negligent"); *Vicon Corp.*, WAB Case No. 65-03 (Dec. 15, 1965), slip opinion at 6-7 ("bad faith or gross carelessness" regarding compliance). Further, a contractor who chooses "to utilize misclassified and thus under paid workers, . . . proceed[s] at its own peril." *Thermodyn Mechanical Contractors, Inc., supra,* quoting *Tele-Sentry Security, Inc.*, WAB Case No. 87-43 (June 7, 1989), slip opinion at 5.

The Administrator charges that the Respondents disregarded their obligation to their employees by failing to pay the wage rates listed in the wage determination of the Secretary of Labor contained in the contracts. I find the Respondents' behavior more culpable than that. The Respondents, experienced government contractors, had ample notice and knowledge of the "all-roofers" area practice well before entering the first contract at issue here with the Naval Reserve. There is overwhelming evidence that by the time of entering the Air Guard contract it knew that an "all-roofers" area practice prevailed in several areas of the country and in particular several areas where it had contracts involving employment practices which were under investigation.

At best, the Respondents simply made no legitimate effort to ascertain the area practices, instead purportedly relying on a misguided understanding of the law and contractual requirements, i.e., erroneously assuming it could shift its burden and rely on the contracting agencies' advice or successfully pursue a policy of deliberate ignorance. There is also some suggestion that the Respondents erroneously believed an area practice based on union practice did not apply to it because it was not a union employer. I find both these arguments disingenuous. Further, ". . . blissful ignorance is no defense to debarment." *Fontaine Brothers,* ARB 96-162 (1997) citing *L.T.G. Construction Co.*, WAB Case No. 93-15 (Dec. 30, 1994).

The Respondents' actions amounted to much more than mere negligence here. As the Wage Appeals Board has stated, "conduct which evidences an intent to evade or a purposeful lack of attention to a statutory responsibility" supports debarment under the Davis-Bacon Act. *L.T.G. Construction Co.*, WAB Case No. 93-15 (Dec. 30, 1994), slip opinion at 7. Respondents' conduct is of the nature described in *L.T.G. Construction, supra*. Further, the successful efforts of the Respondent's supervisor to have interviewed employees not answer questions concerning their work, pay and classifications truthfully, under pain of losing their jobs, buttresses the need to debar the Respondents.

The Administrator seeks debarment of not only Thomas & Sons Building Contractors,

Inc., but also of Mr. James H. Thomas, individually and as a corporate officer of Thomas & Sons Building Contractors, Inc. The Administrative Law Judge's acknowledgment in *Facchiano Construction Company v. Department of Labor*, WAB Case No. 91-06 (August 29, 1991) that "to be of any real effect in insuring future compliance with the requirements of the [Davis-Bacon] Act, a debarment would have to be directed against [company officials]" is equally applicable here. *See also, Howell Construction*, WAB Case No. 93-12 (1994).

## CONCLUSIONS

The Respondents underpaid their employees, as alleged, and willfully disregarded their obligations to their employees, under the Davis-Bacon Act, by misclassifying employees as "laborers" on the two government roofing replacement contracts set forth herein and not classifying and paying them the higher wages of "roofers." The area practices of both contract situs, based upon the practices of signatories to collective bargaining agreements, required classification of workers on roof replacement projects, performing "roofers'" work, as "roofers." In spite of the appearance that some incidental tasks related to the contract performance, such as clean-up, removal of spilled tar, or wall repairs necessitated by tar or water damage, might not require the specialized skills of an experienced roofer, it is clear the area practices required classification of workers performing such work as "roofers." The testimony clearly establishes that roofers are an "unassisted" trade and that the tasks performed by the employees named herein and classified as "laborers" were, in fact, "roofers'" work.

The evidence leaves absolutely no doubt that the Respondents, who had experience with the requirements of government contracting, were on notice of their obligation to inquire into the relevant area practices by October 1991, but most likely even earlier as a result of actions surrounding their previous government contracts. It appears the Respondents disagreed with the area practices and believed those practices were not applicable to them. Thus, the Respondents chose to deliberately ignore the area practices, misclassify their employees and consequently underpay them. This case does not involve the "innocent" low-bidder on a government contract, subject to the Davis-Bacon Act, faced with ignorance of an area practice and subsequent, unexpected, and perhaps ruinous, higher labor costs. Rather, the evidence paints a picture of a shrewd contractor attempting to cut costs or increase profits by hiring laborers and experienced roofers and intentionally misclassifying and underpaying them. This is exactly the behavior the Davis-Bacon Act is designed to forestall.[63]

## ORDER

1. The contracting agencies shall turn over to the Administrator the sums withheld under both contracts with the Respondents, to the extent of the latter's liability.

2. The Administrator shall pay the amount of back wages due the employees who are identified in Appendix A, in the amounts specified.

3. Any sums specified for payment to an identified employee which are not paid to said

[63] The benefits of the burdens, risks and costs the Act places upon government contractors to correctly identify area practices, to ascertain if they are based upon collective bargaining agreements or not, to correctly classify and pay employees, and to mount pre-bid challenges to the appropriateness of prevailing wage determinations, versus the value of the Act to workers and our society today are certainly debatable. Nevertheless, the Act and its implementing regulations are crystal clear. The Federal Acquisition Regulations clauses included in these government contracts and the commendable efforts of contracting agency and Department of Labor officials, such as in this case, to educate and inform bidders and contractors all serve to alleviate the latters' situation.

employee or his or her legal representative within a reasonable time not to exceed one year from the date of this Decision and Order because of inability, after reasonable diligence, to locate the employee or his or her legal representative, shall be deposited in the Treasury of the United States.

4. It is recommended Thomas & Sons Building Contractors, Inc., Mr. James H. Thomas, individually and as a corporate officer of Thomas & Sons Building Contractors, Inc., and, any firm in which the named individual has a substantial interest, shall be debarred in accordance with the provisions of 29 C.F.R. § 5.12(a)(2), for a period of three years and shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1.[64]

RICHARD A. MORGAN,
Administrative Law Judge

RAM:DMR

If review of this decision is desired, the Respondents have 40 days from the date of this decision to file a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Washington, DC 20210 (the "Board"), under 29 C.F.R. § 6.34 and 29 C.F.R. Part 7. Such filing will have the effect of making this decision inoperative unless and until the Board either declines to review the decision or issues an order affirming the decision. 29 C.F.R. § 6.33(b)(1).

[64] Since wages are found due and are unpaid, no relief from the ineligible list is permitted except on condition that such wages are paid. 29 C.F.R. § 6.33(b)(2).

**APPENDIX A**
**Back Wages Owed**

Naval Reserve Contract

| | | | |
|---|---|---|---|
| Richard Chandler | $618.50 | Victor Siemanawicz | $ 289.75 |
| Christopher Labouseur | $598.52 | Tracy Scarpulla | $ 342.00 |
| James Lobue | $342.00 | Michael Sinkiewicz | $1534.00 |
| William Porvasnik | $1918.43 | Total | $5643.88 |

Air Guard Contract

| | | | |
|---|---|---|---|
| Russell E. Beck | $ 727.55 | Joseph Kletzli | $ 106.60+$501.02 |
| David J. Black | $1766.90 | Stephen Kurtz | $ 986.05 |
| Marvin Brown | $ 346.45 | Robert L. Lagerski | $ 53.50 |
| George Delp, Jr. | $ 453.05 | Robert J. Leach | $ 423.74+643.94 |
| Richard Donophan | $ 426.40 | James Lowery | $ 154.57 |
| Roger W. Faith | $ 229.19 | Ronald Lowery | $ 226.53+3078.08 |
| Eric J. Gritter | $ 346.45 | Kevin McCreight | $ 223.86 |
| Joseph Harris | $ 95.94 | John T, McMorris | $1039.35 |
| Hugh P. Hootman, Jr | $2225.28 | Michael Messner | $1790.88 |
| Earl D. Hoy | $3136.71+517.01 | Stanley Peterson | $ 274.50 |
| Robert Hutton | $ 644.93+567.65 | Frank Robson | $1308.52 |
| Michael Jones | $ 346.45 | Frank Scapes | $ 884.78 |
| Irvin Kelley | $ 615.62 | Vincent R. Shaw | $2467.79 |
| Bernard Kirley | $ 287.82 | Glenn Szclulski | $ 181.22 |

Total $22,812.40 + $4,266.67= $27,079.07